

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:28.02.2017

Delivered on:13.03.2017

Coram

The Hon'ble Dr.Justice G.Jayachandran

Second Appeal No.1084 of 1994

1.K.P.Vaithialingam (deceased)
2.K.P.Shanmugasundaram
3.V.Shakthivel Appellants 1 & 2/Plaintiffs 1 & 2
4.V.Rajkumar
5.V.Bhuvaneswari Appellants 3 to 5
(Appellants 3 to 5 brought on record
as LRS of the deceased First Appellant vide
Court Order dated 28.02.2017 made in
C.M.P.No.1901 to 1903 of 2009 in
S.A.No.1084 of 1994

/versus/

1.Kandasamy Gounder Respondents 1 & 2/Defendants 1 & 2
2.K.P.Palanisamy (deceased)
3.Muthayee
4.Selvaraj
5.Pappu @Thulasimani
6.Nallammal Respondents 3 to 8/Respondents
7.Ganesan Respondents 4 to 9 (in AS)
8.Tamilarasan
9.K.P.Murugesan 9th Respondent/1st Appellant (in AS)
10.Alemalu Ammal 10th Respondent/4th appellant (in AS)
11.K.P.Arumugha Gounder (deid) 11th Respondent
(11th respondent impleaded as party respondent
vide order of Court dated 23.02.2007 made in
C.M.P.No.654 of 2007 in S.A.No.1084 of 1994)
12.K.Thangavel
13.M.Shanthi
14.Sivasubramaniam
15.Vimaladevi
16.P.Viswanathan Respondents 12 to 16
17.Uma Maheswari Respondents 17 to 19
18.Geetha
19.Venkateswaran
(R 12 brought on record as LR of the deceased
R11 vide Order of Court dated 04.08.2011 made
in C.M.P.No.710 of 2011 in S.A.No.1084 of 1994)

(R13 has been impleaded as LR of the deceased first appellant as per the Court order dated 28.02.2017 made in C.M.P.Nos.1901 to 1903 of 2009 in S.A.No.1084 of 1994
(RR14 to 19 brought on record as LR's of the deceased R2 as per the Court order dated 28.02.2017 made in C.M.P.No.1907 to 1909 of 2009 in S.A.No.1084 of 1994

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 09.03.1994 in AS.No.74 of 1980 on the file of the 1st Additional District Court, Salem confirming the judgment and decree dated 29.04.1980 in O.S.No.435 of 1976 on the file of the Principal Subordinate Court, Salem.

For Appellants :Mr.D.Sivakumaran
For Respondents :Mr.T.R.Rajaraman for R4 to R6 and 12
Mr.P.Mahalakshmi - for R8
Mr.K.Senthilvelan - for R7
R11-died.

J U D G M E N T

This appeal arises against concurrent finding of the Courts below in the suit filed by the appellants for declaration and injunction.

2. For the sake of convenience, the parties are described as per their rank and status shown in the original suit.

3. The brief facts leading to this appeal are as follows:-

One K.P.Ponnusamy Mudaliar filed suit in O.S.No.95 of 1967 for specific performance of agreements dated 13.10.1966 and 20.12.1966 entered with one K.P.Palanisamy Mudaliar the second defendant. The said suit was decreed and sale deed was executed pursuant to the decree in favour of Ponnusamy Mudaliar. The said K.P.Ponnusamy Mudaliar executed a Will dated 05.04.1970 bequeathing the suit property in favour of the plaintiffs. While so, pursuant to a money decree passed in O.S.No.594 of 1966 against the second defendant K.P.Palanisamy Mudaliar, the first defendant Kandasamy Gounder brought the suit property for sale under Court Auction and the third defendant Palaniappa Gounder was successful bidder. The attachment of the suit property by the first defendant is without any right or binding effect on the plaintiffs and therefore, the sale, pursuant to the attachment in favour of the third defendant, is also not

valid. When the third defendant on 21.12.1976 came along with Amin of the Court to take delivery of possession of the suit property, objection was raised by the plaintiffs and also filed application R.E.A.No.83 of 1976, which was dismissed holding that the plaintiffs have to seek remedy by way of separate suit and not by interlocutory application in the execution proceedings. Hence, the present suit to declare title of the suit property in favour of the plaintiffs and further declaration that the suit property is not liable to attachment and sale in execution of the decree in O.S.No.594 of 1966.

4. The first defendant/judgment debtor in the earlier suit and the second defendant/decreed holder in the earlier suit remained *exparte* and the third defendant, who is the Court Auction Purchaser alone contested the suit on the ground that the order passed in R.E.A.No.84 of 1976 in R.E.A.No.691 of 1976 in R.E.P.No.744 of 1973 in O.S.No.594 of 1966 under Order 21, Rule 99, C.P.C., is perfectly valid and not liable to be set aside. O.S.No.594 of 1966 was filed by one T.Singaravelu Mudaliar against the second defendant K.P.Palanisamy for recovery of Rs.1997.90. After contest, decree was passed on 06.03.1967 against the second defendant. Consequently, the second defendant was indebted to several persons and many of the creditors filed the suits and attached the suit property before the judgment.

5. The alleged sale agreements dated 13.10.1966 and 20.12.1966 were subsequent to the attachment before the judgment passed by the Court in respect of the suit property. The alleged sale agreements are not true and valid, since both the plaintiffs and the deceased Ponnusamy Mudaliar, who were party to O.S.No.95 of 1967 were aware of the debts and attachment. The agreement, which is the subject matter of the suit in O.S.No.95 of 1967 dated 29.08.1967 is a collusive agreement. The third defendant, who is the Court Auction Purchaser, was not aware of this. Decree in O.S.No.95 of 1967 was obtained in a collusive manner. Therefore, Kandasamy gounder filed a suit in O.S.No.206 of 1967 for specific performance against the second defendant as well as Ponnusamy Mudaliar and others, which came to be dismissed by the trial Court. Ponnusamy Mudaliar and the plaintiffs without making any provision for discharging the debts, by collusive manner obtained a decree in O.S.No.95 of 1967. The third defendant, who is the Court Auction Purchaser pursuant to the decree passed in O.S.No.594 of 1966, has become the owner of the property and he is entitled to get delivery of the suit property through Court. The transfer, pursuant to a collusive decree, is hit by Section 53 of Transfer of Property Act, 1882 and therefore, the plaintiffs are not entitled for the relief sought for.

6. The trial Court has held that the plaintiffs cannot

rely upon the finding in the earlier suit in O.S.No.206 of 1967, in which the third defendant was not a party to the said suit and moreover, the suit was not decided on merit but ended in a compromise decree between the plaintiffs and the defendants. However, the trial Court after discussing Exs.A19 and A20-attachment order passed in the execution proceedings in O.S.No.594 of 1966 has concluded that it cannot be disputed for a moment that as a assignee decreeholder the first defendant is entitled to avoid the transfer of property under Section 53 of the Transfer of Property Act, 1882.

7. While discussing about the subsequent Will executed by K.P.Munusamy Mudaliar in favour of the plaintiffs 1 to 3, the trial Court has held that the Will relied upon by the plaintiffs is invalid because, the testator K.P.Munusamy Mudaliar had no perfect title over the suit property, since the sale in his favour by the second defendant is hit by Section 53 of the Transfer of Property Act, 1882.

8. Against the judgment of the trial Court, the plaintiffs preferred an appeal in A.S.No.74 of 1980 on the file of the I Additional District Court, Salem, wherein the first appellate Court dismissed the appeal confirming the judgment and decree of the trial Court.

9. On appeal, this Court has formulated the following Substantial Questions of Law for consideration:-

1.Whether the Courts below are correct in invoking Section 53 of the Transfer of Property Act (in the facts and circumstances of a case) where the 1st respondent herein, himself being a claimant to the suit property, had laid a suit in O.S.No.206 of 1967 and discharged the creditors of the second defendant herein?

2.Whether the auction purchaser cannot be "subsequent transferee" within the meaning of the words in Sub Sec.2 of Sec.53 of the Transfer of Property Act?

3.Whether in any view of the case, an auction purchaser in court action can be a creditor within the meaning of the terms as compromised in Sec.53 of the Transfer of Property Act?

4.Whether the auction purchaser in Court auction, assuming to be a creditor, can maintain a defect under Sec.53 of the Transfer of Property Act which mandates a challenge on behalf of a body of creditors in a representative capacity?

5. Whether it is open to an auction purchaser in a court auction, in which there is no warranty of title, to challenge a sale inter vivos under Sec.53 of the Transfer of Property Act?

6. Whether the invocation of Sec.53 of the Transfer of Property Act, to challenge Ex.A1, is barred by res judicata in view of the judgments of Sub Court, Salem in B55 and A8?"

10. The barren truth in this case is that, the sale agreements are the subject matter of the suit in O.S.No.95 of 1967 filed between the father K.P.Ponnusamy Mudaliar and son K.P.Palanisamy. Pursuant to the compromise decree entered between them in this suit a sale deed has been executed by the 2nd defendant K.P.Palanisamy Mudaliar to his father K.P.Ponnusamy Mudaliar vide Ex.A31 on 29.08.1967. K.P.Ponnusamy Mudaliar in turn bequeathed the property by way of Will dated 05.04.1970 Ex.A32 in favour of the plaintiffs 1 to 3, who are his sons. All these transactions were done within the family members of K.P.Ponnusamy Mudaliar and K.P.Palanisamy Mudaliar, when the attachment of the suit property in O.S.No.594 of 1966 was in force. Therefore, the Courts below have rightly held that pending attachment, when the 2nd defendant was indebted to several persons and the suits were pending, his alienation of the property to his father vide Ex.B31 on 29.08.1967 is hit by Section 53 of the Transfer of Property Act, 1882. Documents reveals that the plaintiffs in O.S.No.594 of 1966 has obtained order of attachment before judgment on 19.06.1966 and got decree on 06.03.1967, Ex.B68, Ex.B74 and Ex.B75 are the documents which disclose the above details. Whereas the alleged agreements are dated 13.10.1966 and 20.12.1966 based on which O.S.No.95 of 1967 has been decreed. The dates above mentioned clearly indicate the agreements upon which decree of specific performance passed in O.S.No.95 of 1967, while attachment before judgment was in force. Hence, the third defendant, who is the court auction purchaser, pursuant to the decree passed in O.S.No.594 of 1966 is legally entitled to get the title and possession dehors the decree passed in O.S.No.95 of 1967 which, on the face of the record, is a collusive decree between the father and son to defeat the creditors. The third defendant, who is the Court auction purchaser, cannot be deprived of his title by the collusive decree obtained behind his back. Section 53 of the Transfer of Property Act, 1882 squarely applies to this case. The Courts below have taken all efforts to look at the chequered legal history of the case and had properly appreciated the facts and law involved in this case.

11. This Court does not find any illegality or perversity in the judgments of Courts below to interfere with under Section 100 of the Civil Procedure Code. Hence, this Second Appeal is dismissed. No order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

- 1.The 1st Additional District Judge, Salem.
- 2.The Principal Subordinate Judge, Salem.

+1cc to Mr.P. Mahalakshmi, Advocate, S.R.No.16011
+1cc to Mr.T.R. Rajaraman, Advocate, S.R.No.15956
+1cc to Mr. D. Shivakumaran, Advocate Sr.No.15865

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md(04/04/2017)

S.A. No.1084 of 1994



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