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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON :31.08.2017
PRONOUNCED ON:04.12.2017

CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.A (MD) No.617 of 2017
and
C.M.P. (MD) .No.6450 of 2017

V.Swaminathan ... Appellant / Petitioner /3rd Party

Vs.

1.Mohanram ... Respondent/Respondent No.1
1st Respondent/Plaintiff
Radhakrishnan (died)

2.Geetharani ... 2nd Respondent/3rd Respondent
2nd Respondent/2nd Defendant

3.Priya

4.Bhuvaneswari

Archana (died)

5.Manikandan

6.Suganya Respondents/Respondents 4, 5,
7, 8/Respondents 3,4, 6, 7/
L.Rs of 1st defendant

PRAYER:- Civil Miscellaneous Appeal filed under Order 21 Rule 58(4) of C.P.C. against the order dated 24.03.2017 made in E.A.No.8 of 2016 in E.P.No.102 of 2016 in O.S.No.10 of 2006 on the file of the Additional District Court (FTC) Kumbakonam.

For Appellant :Mr.R.Vijayakumar
For R-1 :Mr.M.V.Santharaman
For R-2 :No appearance

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant against the order dated 24.03.2017 made in E.A.No.8 of 2016 in E.P.No.102 of 2016 in O.S.No.10 of 2006 on the file of the Additional District Court (FTC) Kumbakonam.

2. The appellant would aver among other things that the decree holder, who are the respondents in the present Civil Miscellaneous Appeal filed a suit in O.S.No.10 of 2006 for money claim in the year 2006 against one Radhakrishnan and his wife Geetharani. Pending suit, an order of attachment before judgment was passed on 13.03.2006 in I.A.No.43 of 2006 in O.S.No.10 of 2006 by attaching T.S.Nos.982 to 985 and T.S.Nos.679 and 680 of ward No.2, Kumbakonam Taluk, Thanjavur District and the order of

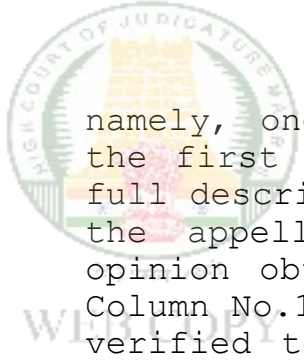


attachment was made absolute on 03.04.2006. According to the appellant, though the suit was decreed in favour of the plaintiff, the attachment was not communicated to the Sub-Registrar concerned and the same was not reflected in the encumbrance certificate.

3. While the matter stood thus, according to the appellant, his father purchased the property in T.S.No.984 under a registered Sale Deed dated 03.05.2011 without knowing that the property in T.S.No.984 was already attached by the Court Order as stated supra. The first respondent who is the plaintiff filed E.P.No.12 of 2013 to bring the attached properties for sale to realise the decree amount. At this juncture, the brother of the deceased/1st defendant filed E.A.No.5 of 2016 stating that all the properties under attachment are joint family properties and in respect of the share of the said Radhakrishnan, a release deed in respect of T.S.No.984 was executed and therefore, filed the above E.A. to raise the attachment in respect of other properties. Therefore, E.A.No.8 of 2006 was allowed raising the attachment in the other survey except T.S.No.984. This order passed in E.A.No.8 of 2006 was not challenged by the decree holder/1st plaintiff. According to the appellant, he got the property by way of settlement from his father one Vengadesan who purchased the attached property on 03.05.2011, as a *bona fide* purchaser. Thus, the appellant is the absolute owners of T.S.No.984 from the year 2007 which was attached and made absolute on 03.04.2006. The Court below, after appreciation of evidence both documentary and oral found that this appellant is not a *bona fide* purchaser and rejected his claim and aggrieved over the same, this appellant is before this Court praying for the relief stated supra.

4. Learned counsel for the appellant submits that at the time of purchasing the property in question, by his father, there was no encumbrance reflected in the encumbrance certificate and therefore, the petitioner is a *bona fide* purchaser. On this aspect, learned counsel for the appellant would place reliance on the encumbrance certificate was obtained on 10.02.2010, in which, there was no entry with regard to the encroachment and the same was also marked as Ex.C.1, and according to the appellant, this vital document has not been considered by the Court below. Hence, he prays for allowing this Civil Miscellaneous Appeal.

5. *Per contra*, learned counsel appearing for the first respondent submits that the appellant is not a *bona fide* purchaser as the said encumbrance certificate produced by the appellant before this Court does not show the correct description of the property as required under law while applying the encumbrance certificate for which he relied on the format supplied by the registration department and as per the condition stipulated therein, the acts and encumbrance shown in the "certificate" are those discovered with reference to the description of properties furnished by the applicant. If the same properties have been prescribed in the registered documents in a manner different from the way in which the applicant has described them, transaction evidenced by such document will not be included in the certificate. He would also bring to the notice of this Court that the encumbrance certificate relied on by the appellant are neither applied by the appellant nor the city union bank, Kumbakonam, but has been applied by one third party,



namely, one Sundaramoorthy and therefore, the learned counsel for the first respondent submits that the appellant does not show the full description of the property as elucidated in Ex.A.7 produced by the appellant. Further, according to the appellant, the legal opinion obtained by the appellant has been specifically stated in Column No.10 that the details of encumbrance, if any shown has to be verified to show that the property purchased by the appellant is free from encumbrance. According to the first respondent, the encumbrance certificate referred to in the legal opinion obtained by the appellant as admitted by him in the evidence was not marked. The specific admission by the appellant as P.W.1 in his deposition has stated that as per the legal opinion, the encumbrance, if any was not verified as to its clearance. The first respondent would further submit that the sale is made contrary to Section 53 of the Transfer of Property Act. The only exception is that the purchaser should have purchased in a *bona fide* manner. Here the appellant has obtained encumbrance certificate and legal opinion, prior to the purchase of the property in the year 2011. Such encumbrance certificate was not marked as an exhibit for the best reasons known to him and according to the first respondent, this impliedly proves that he is aware of the encumbrance and as admitted by him, he has not taken sufficient steps to verify whether the encumbrance was cleared or not as stated in the legal opinion. In the evidence, he has categorically denied that he has not marked the documents, the legal opinion and the encumbrance certificate reflected in the legal opinion which was obtained prior to the sale. It is the specific averment of the first respondent that the encumbrance certificate obtained by a third party was with a different boundary and the same was produced which naturally will not show the correct encumbrance and hence, the respondent wantonly and wilfully failed to produce the true encumbrance certificate and therefore, he is not a *bona fide* purchaser and prayed for the dismissal of the above appeal.

6. Heard the learned counsel appearing for the respective parties and perused the materials available on record.

7. The short point to be decided in this Civil Miscellaneous Appeal is whether the appellant is a *bona fide* purchaser or not?

8. The appellant case wholly devolves upon the encumbrance certificate obtained by the appellant on 10.02.2010, which does not reflect the encumbrance, more particularly, the attachment made by the Court below on 03.04.2006. However, a perusal of the encumbrance certificate would show it is neither applied by the appellant's father nor the Union Bank or this appellant herein, but, it has been applied by one Sundaramoorthy. Added further, the alleged encumbrance certificate claimed by this appellant does not in consonance with the schedule of the property in question which reflects in Ex.A.7, which is the actual property. Further, in the legal opinion obtained by this appellant, three entries are available, namely, encumbrance certificate dated 10.12.2010, 14.03.2011 and 25.07.2013 which is not marked or produced before this Court and there is a specific Clause 10 of the legal opinion given by the one Ashokan, where, it has been specifically stated



that the details of encumbrance, if any, if so have they been discharged. (E.C. for minimum period of 27 years to be verified). Whether it has been verified or not has not been pleaded by the appellant before the Court below. Added further, in his deposition, this appellant has clearly admitted that neither he marked the legal opinion nor marked the encumbrance certificate obtained prior to his purchase. Therefore, it could be presumed that the non-disclosure of the relevant and material documents before the Court below would be a sufficient ground to draw a conclusion that this appellant is not a *bona fide* purchaser. The Registration Department has clearly instructed as to how the encumbrance certificate has to be applied for getting encumbrance certificate. Here, the encumbrance certificate relied on by this appellant is procured by a third party, that too, with wrong description.

9. This Court is of the considered view that the Court after scanning through entire materials, oral and documentary evidence, has perfectly recorded the finding, in which, there could be no illegality or infirmity in the impugned order. Further, even assuming for a moment, that the appellant has proceeded for valuable consideration, he can sue only against his vendor and not against the property which was properly attached by the Court below. This Court need not emphasis the settled law that the transaction of any property either in the form of sale, mortgage, lease etc., after the attachment by the Courts, will indefinitely be *null and void*.

10. On the whole, this appellant has not made out any case warranting interference of the order of the Court below and this Civil Miscellaneous Appeal is liable to be dismissed and accordingly, it is dismissed and it is open to the appellant to proceed against his vendor, if he desires to do so. No costs. Connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CSII)

/True Copy/

Sub-Assistant Registrar

To,
The Additional District Judge (Fast Track Court), Kumbakonam.
+One cc to Mr.T.R.Subramanian, Advocate, SR.No.90612
+One cc to Mr.R.Vijayakumar, Advocate, SR.No.90772
Copy to: The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai

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RL/6C/4P/MR/SAR4/24/1/2018

Judgment made in
C.M.A (MD) No. 617 of 2017
04.12.2017