



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.04.2018

Delivered on: 25.07.2018

WEB COPY

CORAM

THE HONOURABLE Mrs.JUSTICE S.RAMATHILAGAM

C.M.S.A.No.25 of 2009

Ayyanar

.. Appellant

Versus

1. Kuppammal
2. Ramachandran
3. Arumugam
4. Sakunthala

... Respondents.

(Respondents 3 and 4 remained
ex-parte in 1st Appellate Court
and did not contest and as such
the notice to them may be dispensed
with)

Civil Miscellaneous Second Appeal filed under Order 21 Rule 58 r/w Section 100 of CPC, against the Judgment and Decree in A.S.16 of 2008 dated 30.04.2009 on the file of the Principal District Judge, Villupuram reversing the Order and Decreetal Order in E.A.78/2004 in E.P.79/2000 in OS.No.129/1998 dated 09.10.2006 on the file of the Principal Subordinate Judge, Tindivanam.

For Appellant : M/s.N.Suresh
For Respondents: M/s.A.K.Kumarasamy,
Senior Counsel for
Mr.S.Kaithamalai Kumaran for R1

JUDGMENT

This Civil Miscellaneous Second Appeal has been preferred against the Judgment and Decree in A.S.No.16 of 2008 dated 30.04.2009 on the file of the Principal District Judge, Villupuram reversing the Judgment and Decree in E.A.No.78 of 2004 in E.P.79 of 2000 in O.S.No.129 of 1998 dated 09.10.2006 on the file of the Principal Subordinate Judge, Tindivanam.



2. For the sake of convenience, the parties herein are referred as per ranking in E.A.No.78 of 2004.

3. The brief facts of the petition in E.A.78 of 2004 is that the property in Item " A " in the petition is the second respondent's Joint Family property and Sale agreement was entered with regard to the " A " schedule property on 13.06.2000 and on the same day, the property was also handed over to the petitioner. Hence, after 13.06.2001, the petitioner along with his minor sons got the property registered and from that date, they are in possession and enjoyment of property. Further, the petitioner has stated that " B " schedule property belongs to the third respondent. On 13.10.1997, the sale agreement was made but the said " B " schedule property belongs only to the third respondent by way of settlement. Based on the agreement, the first respondent filed a suit against the second and third respondents and he obtained an ex-parte decree on 25.11.1999 only for the advance amount. Based on the said decree passed for the recovery of advance amount , execution petition was filed and the said " A " schedule property was attached by the court but the said " A " schedule property is not a property which is the subject matter of the Sale Agreement dated 13.10.1997. Only, out of grudge, the petitioners have attached the property which is not covered in the sale agreement dated 13.10.1997. Actually, the 1st respondent should have proceeded only against the property that belongs to the third respondent but only with a view to give trouble and inconvenience to these petitioners, the property, which is not covered in the Sale Agreement dated 13.10.1997 was attached. Further, these petitioners have stated that after the sale, they were residing in Olakkur village and they are totally unaware of the E.P.proceedings taken by the first respondent and only recently, they came to understand that the properties are brought for sale and on enquiry dated 22.03.2003, the second and third respondents filed a petition to set aside the ex-parte decree. Though these petitioners purchased the property in a proper way, the respondents colluded together to act against these petitioners. These petitioners have filed petition to release the property that was attached in the E.P. Hence, it is the averment of the petitioners that there is no attachment of " A " schedule property , on the date of sale by these petitioners. Further, the 1st respondent cannot attach the 2/3rd share of the minors. Hence, on the whole, the grievance of the petitioners is that the petition mentioned property is not a property involved in the suit. The 1st respondent has to proceed against the " B " schedule property alone whereas he has proceeded against " A " schedule property, which is against law. Only after verifying that there is no encumbrance on the " A " schedule property, he entered into an agreement and purchased the same. Hence, the attachment of the said property and bringing the same for sale is contrary to the law.



4. In his Counter Statement, the first respondent denied the facts regarding the sale of petition mentioned property on 13.06.2000. Further, the first respondent also totally denied the sale agreement made on 13.06.2000. It is also stated by the first respondent that the 1st petitioner is the daughter of Judgment Debtor's sister's son. The second petitioner is the sister of Judgment Debtor's wife. Hence, the attachment proceedings are very much known to them. Only to defeat the right of this respondent, the sale has been created. Further, the petitioners have made the sale fully knowing the proceedings of the case. Hence, the sale is not a bonafide one. Further, in said petition property, the third respondent has no exclusive rights, already the defendants have only right of enjoyment over the suit property. This respondent filed the suit only for the amount that he is entitled. Hence fully knowing the auction details, earlier the version of the petitioners that they come to be known about the same only on 22.03.2003 is a false one. This respondent has taken auction proceedings only against the properties that belong to second respondent. Hence, the petition filed by the petitioners is not maintainable and the auction proceedings need not be stayed.

5. Before the Trial Court, witnesses were examined on the side of the petitioners and the respondents. Based on the evidence, it is observed that the second item of property belongs to the second respondent and his two sons as Joint Family property and the said property was purchased on 13.06.2001 and hence they are the owners of the said item of the property.

6. Regarding the argument of the petitioners that there was no attachment of " A " schedule property on the date of sale, no sale agreement was filed. The argument of the petitioners that the first respondent who instead of attaching the property in the sale agreement has attached their property and it is known to them only on 22.03.2003 was not considered by the Trial Court, but, the above argument was objected by the first respondent by stating that the property which was entered into for sale to be enjoyed by the third respondent and only after the life time his legalheirs have to enjoy the same was known to him by perusing the Settlement deed. Hence, there cannot be any possibility for selling the said property and as per Panchayathars arrangement, the suit was filed only for the recovery of advance amount and also to safeguard that right to prevent the alienation of the property an order of attachment before Judgment was obtained by the first respondent. Hence, the averments made in the petition are false. Since, the property for which sale agreement was made belongs to the second and third respondents and their son, he could not proceed against the same and auction was proceeded against the defendant



property. Hence, by observing the fact that the second and third respondents have not denied sale agreement and they have no right in the suit property, the same was rejected by the Trial Court. However, the Trial Court observed in Ex.R.1 Encumbrance Certificate, the attachment details were entered in the encumbrance certificate on 10.05.2000. Hence, the argument of the petitioners that they are not aware of the attachment proceedings till 2003 was not considered by the Trial Court. Hence, the sale made by the petitioners with regard to the property that was attached already.

7. The Trial Court has observed that only to defeat the right of the first respondent, the petitioners have fabricated a sale deed. It is also confirmed from Ex.R.1 that when there is an entry in the Encumbrance Certificate with regard to the attachment, the sale deed dated 13.06.2001 was created one. Hence the said property to be relieved from the auction is not maintainable one. Hence the prayer of the petitioners is that the first item of the property should be removed from the attachment is not maintainable. Hence, the petition filed by the petitioners was dismissed by the Trial Court. Aggrieved against the said order, the petitioners/claimants have preferred the appeal in A.S.16 of 2008 to set aside the attachment order against the " A " schedule property.

8. The Appellate Court has observed that the first respondent who filed the I.A.No.430 of 1998, in the said I.A. stated that the property made for attachment is mentioned as Survey Nos.151 /2 1 acre 04 cent and 151/7, 0.38cent but in the plaint, the first respondent who is the plaintiff, stated that there was no agreement made for the property in Survey No.151/2 and 151/7. In the sale agreement, the property mentioned as 1 acre 33 cent in Survey No.30/02 , old survey No 9. It is also observed by the Appellate Court when the petition in I.A.No.430 of 1998 was filed, no Counter Statement was filed. When the petition for adjournment was pending for filing the counter, there was no counter filed for the advance hearing petition. Petition which was filed after the attachment was dismissed. Further, the Appellate Court has also observed that the attachment order was also made absolute on 25.11.1999. The observation of the Appellate Court is that there was no proper notice taken to the respondent Nos 2 and 3. It is observed by the Appellate Court that the 1st respondent can claim attachment only against the property which has been stated in the plaint and not the other property. The observation made by the Appellate Court is not a fair one because it failed to note that as per the sale agreement, the sale could not be made. When there was no right over the property by the defendants, the plaintiff filed suit only for recovery of advance amount. The attachment before Judgment was also sought for the recovery of money by attaching the other property which is not mentioned in



the plaint. It could be very well observed that there was an entry in the encumbrance certificate on 10.05.2000. But, the petitioners have purchased the property as per sale agreement with regard to the first item of " A " schedule property on 13.06.2000. An observation was made by the Appellate Court that when the attachment was made absolute in I.A.No.430 of 1998. There cannot be another attachment by way of subsequent order, which is not a proper one. Only after passing of the decree, the execution petition was filed to proceed against the property on which the attachment before judgment was made in the I.A is only to safeguard the right of the 1st respondent/ the appellant herein. Hence, the attachment already made in I.A.No.430 of 1998 is a property which has been attached to secure the right of the first respondent. Hence, the order passed by the Appellate Court is set aside by confirming the order passed in E.A.No.78 of 2004.

9. In the result, this Civil Miscellaneous Second Appeal is allowed and the judgment passed in C.M.A.No.16 of 2008 is set aside by confirming the order passed in E.A. 78 of 2004. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

vv

To

1. The Principal District Judge, Villupuram
2. The Principal Subordinate Judge, Tindivanam.
3. The Section Officer, VR Section,
High Court, Madras.

+1cc to Mr.S.Kaithamalai Kumaran, Advocate sr.no.50206
+1cc to Mr.N.Suresh, Advocate sr.no.50139

C.M.S.A.No.25 of 2009

nr 05/09/2018