



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 04.12.2017
DELIEVRED ON : 09.03.2018

WEB COPY

CORAM:

THE HONOURABLE MRS.JUSTICE J. NISHA BANU

C.R.P (MD) No.985 of 2016 (PD)

N.Murugesan

... Petitioner/1st respondent/
Petitioner/Plaintiff

Vs.

1.B.Shiva

... 1st respondent/Third party

2.D.Murugan

3.M.Shanthi

... Respondents 2 & 3/
Respondents 2 & 3 /
Respondents/Defendants

(R2 & R3 are given up in the civil revision petition)

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, praying to set aside the fair and decreetal order, dated 18.12.2015, passed in I.A.No.86 of 2014 in I.A.No.87 of 2013 in O.S.No.60 of 2013 by the learned Subordinate Judge, Uthamapalayam.

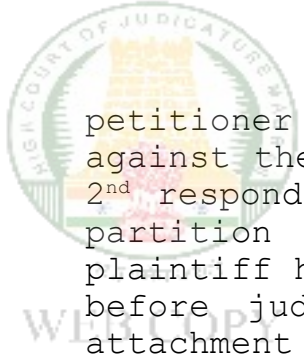
For Petitioner : Mr.T.R.Jeyapalam
For 1st respondent : Mr.R.Karunanithi

ORDER

This civil revision petition has been filed by the revision petitioner / plaintiff challenging the fair and decreetal order, dated 18.12.2015, passed in I.A.No.86 of 2014 in I.A.No.87 of 2013 in O.S.No.60 of 2013 by the learned Subordinate Judge, Uthamapalayam.

2.The brief facts, which are necessary to decide the present civil revision petition, are as follows:-

(a) According to the revision petitioner / plaintiff, the respondents 2 and 3 / defendants 1 and 2, who are husband and wife respectively, had borrowed a sum of Rs.9.50 lakhs from the revision petitioner / plaintiff, for which they have executed a promissory note. But, the respondents 2 and 3 / defendants 1 and 2 did not pay either interest or repay the principal amount. Hence, the revision



petitioner / plaintiff has filed money suit in O.S.No.60 of 2013 against the respondents 2 and 3 / defendants on 16.04.2013. As the 2nd respondent / 1st defendant was allotted to the property through partition deed, dated 25.04.2011, the revision petitioner / plaintiff has filed I.A.No.87 of 2013 for attachment of the property before judgment and the same was ordered and accordingly, the attachment was effected on 03.10.2013.

(b) In the meantime, on 17.04.2013 the 2nd respondent / 1st defendant has settled the property in dispute in favour of his unmarried daughter, who, in turn, sold the same to the 1st respondent / third party for a valid sale consideration on 25.04.2013. When the 1st respondent / 3rd party, came to know about the attachment of the property in dispute, he has filed I.A.No.86 of 2014 stating that he is the *bona fide* purchaser of the property and that the property mentioned in the petition in I.A.No.87 of 2013 differs. The Court below has allowed I.A.No.87 of 2013 holding that notice has not been served to the 2nd respondent / 1st defendant and that the 1st respondent / 3rd party has purchased the property in dispute in good faith. Aggrieved by the said order, the present civil revision petition has been filed by the revision petitioner / plaintiff.

3. The learned counsel for the revision petitioner / plaintiff would submit that though the 1st respondent / 3rd party projected the case as if the property mentioned in the petition belongs to the brother of the 2nd respondent / 1st defendant, the Court below has rightly rejected the said contention by relying upon the evidence of the 1st respondent / 3rd party and also documents marked on the side of the 1st respondent / 3rd party. He would further submit that anticipating that the revision petitioner / plaintiff would file a suit, the respondents 2 and 3 / defendants 1 and 2 have filed a caveat petition and the counsel, who appeared for the respondents 2 and 3 / defendants 1 and 2, took notice in the suit and also in the petition filed for attachment before judgment on 16.04.2013 itself. In order to defeat the right of the revision petitioner / plaintiff, the 2nd respondent / 1st defendant on 17.04.2013 settled the property in favour of his unmarried daughter, who in turn sold the property in dispute to the 1st respondent / 3rd party. Hence, the settlement deed executed by the 2nd respondent / 1st defendant is hit by Section 53(1) of the Transfer of Property Act and the subsequent fraudulent transaction ie., the sale deed executed by the daughter of the 2nd respondent / 1st defendant in favour of the 1st respondent / 3rd party, cannot be sustained.

4. The learned counsel for the revision petitioner / plaintiff would further submit that as per Order 5 Rule 15 of C.P.C., service of notice on any adult member to the family whether male or female who resides with him is sufficient and the Court below, without taking note of the same, has erroneously allowed the said interlocutory application holding that in the petition for attachment before judgment, though notice has been served on the 3rd respondent / 2nd defendant, notice has not been served on the 2nd



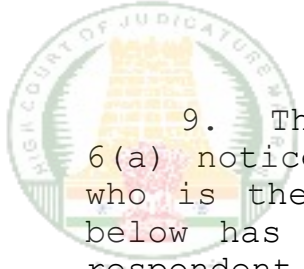
respondent / 1st defendant. Thus, he prayed to set aside the order passed by the Court below.

5. The learned counsel for the 1st respondent / 3rd party would submit that after verifying all the documents, he had found that there was no encumbrance on the disputed property and therefore, he had purchased the property for a valuable sale consideration. When he had applied for encumbrance certificate for availing loan, he has found that the property has been attached with I.A.No.87 of 2013 in O.S.No.60 of 2013. Since there was no attachment order on the date of purchase of the house property, the 1st respondent / 3rd party is a *bona fide* purchaser and as the 1st respondent / 3rd party has purchased the property for a valuable sale consideration, the said transaction would not hit by Section 53 of the Transfer of Property Act. The Court below has rightly allowed the said interlocutory application holding that no notice has been served to the 2nd respondent / 1st defendant and the said order need not be interfered with. Thus, he prays for dismissal of this civil revision petition.

6. Heard the learned counsel for the revision petitioner and the learned counsel for the 1st respondent and perused the materials available on record.

7. It is seen from the record that though it was the contention of the 1st respondent / 3rd party that the borrower of the revision petitioner / plaintiff is the other D.Murugan to whom the southern property had been allotted under 'A' schedule of partition deed, dated 25.04.2011, the Court below, based on the evidence of the 1st respondent / 3rd party and other documents viz., promissory note, wherein the name of the 2nd respondent / 1st defendant and his wife 3rd respondent / 2nd defendant, settlement deed, Voter Identity card issued by the Election Commission of India, etc., has rightly held that the petitioner had filed the suit and the petition for attachment before judgment only against D.Murugeswaran @ Murugan and held that the correct property attached in the petition for attachment before judgment.

8. The promissory note was executed by the respondents 2 and 3 / defendants 1 & 2 on 29.07.2010. The partition deed between the 2nd respondent / 1st defendant and his brother D.Murugan was entered on 25.04.2011. The legal notice issued by the revision petitioner / plaintiff was acknowledged by the respondents 2 and 3 / defendants on 12.04.2013. It is submitted by the revision petitioner / plaintiff that the respondents 2 and 3 / defendants have filed a caveat petition on 16.04.2013 and that on getting information about the petition for attachment before judgment filed by the revision petitioner / plaintiff, on the very next day, the 2nd respondent / 1st defendant has settled the property in favour of his unmarried daughter Shanthipriya, in order to defeat the claim of the revision petitioner / plaintiff and the same is hit by Section 53(1) of the Transfer of Property Act.



9. The Court below has held that on 16.04.2013 itself Section 6(a) notice has been served on the 3rd respondent / 2nd defendant, who is the wife of the 2nd respondent / 1st defendant. The Court below has mainly allowed the petition on the ground that the 2nd respondent / 1st defendant, who is the owner of the property, has not been served with notice and therefore, the settlement deed executed by the 2nd respondent / 1st defendant cannot be a fraudulent transfer.

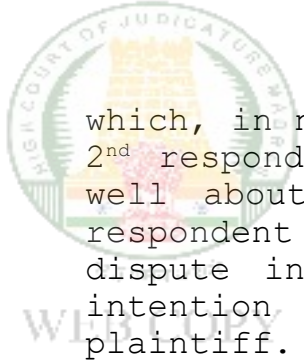
10. At this juncture, this Court is inclined to refer to Order 5 Rule 15 of C.P.C., which reads as follows:

"15. Where service may be on an adult member of defendant's family.- Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him.

Explanation.- A servant is not a member of the family within the meaning of this rule."

11. From the above provision, it is clear that if the defendant is absent from his residence, service may be effected on any adult member of the family, whether male or female, who is residing with him and that a servant would not come under the definition of "family member" of the said rule. It is also stated by the revision petitioner / plaintiff that the respondents 2 and 3 / defendants had filed caveat petition and the caveator had been put on notice about the institution of the proceedings against them. As stated earlier, in this case, the 3rd respondent / 2nd defendant, who is the wife of the 2nd respondent / 1st defendant, has been served with notice on 16.04.2013. Though the service of the 2nd respondent / 1st defendant can be effected through the 3rd respondent / 2nd defendant, it has not been done so. It is not the case of the defendants that they are living separately. When that be so, this Court is of the view that it has been sufficiently brought to the knowledge of the defendants that a suit, along with the petition for attachment before judgment, had been filed by the revision petitioner / plaintiff. Hence, it can be held that only with the intention to defeat the right of the revision petitioner / plaintiff, the 2nd respondent / 1st defendant has settled the property in favour of his daughter.

12. As per Section 53 of the Transfer of Property Act, every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. The disputed property was allotted to the share of the 2nd respondent / 1st defendant as early as on 29.04.2011. But, only on 17.04.2013, the 2nd respondent / 1st defendant settled the property in favour of his unmarried daughter,



which, in normal circumstances, no one do so. The said action of the 2nd respondent / 1st defendant would go to show that knowing fully well about the petition for attachment before judgment, the 2nd respondent / 1st defendant had purposefully settled the property in dispute in favour of his unmarried daughter with the fraudulent intention to defeat the claim of the revision petitioner / plaintiff. When that be so, the subsequent sale of the property in favour of the 1st respondent / 3rd party by the unmarried daughter of the 2nd respondent / 1st defendant cannot be given effect to, though it is contended by the 1st respondent / 3rd party that he has purchased the property in good faith and for a valid consideration and the 1st respondent / 3rd party would not get any legal right over the property in dispute.

13. In similar circumstances, a learned Single Judge of this Court in **N.Thirumal Vs. K.Somasundaram, reported in 2013 (2) MWN (Civil) 432** has held in paragraph Nos.15 and 16 as follows:

"15.Thirdly, the learned trial court while considering the case of the appellant/petitioner has rightly applied the doctrine of *lis pendens* as contemplated under Section 52 of the Transfer of Property Act. It is relevant to extract Sections 52 and 53 of the Transfer of Property Act for perusal of the same.

52. Transfer of property pending suit relating thereto.- During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

[Explanation.-- For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]



53.Fraudulent transfer.- (1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Nothing in this sub- section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub- section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree- holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub- section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

16. A bare reading of the abovesaid provisions makes it abundantly clear that if any property against which suit is filed, should not be alienated or transferred during the pendency of the suit. If any such property is transferred or otherwise dealt with by any other party to the suit so as to affect the rights of any other party thereto under any decree or order which may be made therein, the same shall be hit by the doctrine of *lis pendens* namely, such transaction shall be held as void. In the present case, admittedly as I mentioned above, when the suit filed by the 1st respondent/plaintiff was pending, notice was issued both in the suit and I.A.No.43 of 2008 on 02.02.2008 to the 2nd respondent/defendant, who remained *ex parte* before the trial court and also before this court, but cleverly chose to alienate only his share in the undivided suit property in favour of the appellant/petitioner by a registered sale deed dated 07.02.2008, which in my opinion is nothing but a well planned transaction with an intention to defeat the rights of the 1st respondent/plaintiff in whose favour, the order of attachment was passed. Therefore, as rightly held



by the Apex Court in the case of **Hamda Ammal Vs. Avadiappa Pathat and three others**, reported in **1991 (1) SCC 715**, which states that any transaction alienating the suit property during the pendency of the suit proceedings is void, this Court is not inclined to interfere with the impugned order."

14. The above decision is squarely applicable to the facts of this case. The Court below, without considering the above position, has allowed the said interlocutory application and the same need to be interfered with.

15. In view of the above, this civil revision petition is allowed and the order impugned in this revision petition is set aside and I.A.No.86 of 2014 is dismissed. No costs.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

1. The Subordinate Judge,
Uthamapalayam.
2. The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+ 1 CC TO Mr.T.R.JEYAPALAM, ADVOCATE IN SR No. 54239

GCG

TE/SKN-RSK/SAR-4 : 20/03/2018 : 7P/5C

order made in
C.R.P (MD) No.985 of 2016 (PD)
09.03.2018