

THE HON'BLE SRI JUSTICE A.SHANKAR NARAYANA

APPEAL SUIT No.499 of 2008

JUDGMENT:

The present appeal suit arises out of order passed in E.A.No.44 of 2006 in E.P.No.7 of 2005 in O.S.No.773 of 2001 on the file of the III Additional Senior Civil Judge (Fast Track Court), Visakhapatnam.

The revision petitioner as third party filed E.A.No.44 of 2006 in E.P.No.7 of 2005 under Order XXI Rule 58 of CPC laying a claim over the E.P. schedule property before the III Additional Senior Civil Judge at Visakhapatnam. The E.P. schedule property consists of vacant site admeasuring 19.39 sq. yards and shop No.17 in an extent of 175 sq. feet in ground floor, which are shown as item Nos.1 and 2 situated at Mangalagiri Complex abutting on North of Aseelmetta Railway Station Road situated in Block No.25, TS.No.690 of Allipuram Ward, Visakhapatnam Municipal Corporation, Visakhapatnam.

For the sake of convenience, the appellant herein is referred to as third party, the 1st respondent as the decree holder, and respondent Nos.2 to 4 as judgment debtors (J.Drs).

Virtually, the contest is between the third party and the decree holder. The decree holder entered into an agreement of sale with J.Drs on 02.01.2001 to purchase the petition schedule property for a total consideration of Rs.4,75,000/- and an amount of Rs.3,50,000/- was paid as advance. Thereafter, it came to light that the schedule property was mortgaged to third parties and there were several encumbrances. The

J.Drs have not come forward for registration and, therefore, the decree holder filed the suit in O.S.No.773 of 2001 for refund of money with interest. He has also filed I.A.No.1447 of 2001 for attachment of the schedule property and show cause notice and attachment was ordered by the Principal Senior Civil Judge on 15.10.2001. The J.Drs received notices and filed counter affidavit admitting all the facts and gave an unconditional undertaking that they will not alienate the suit schedule property to anybody except decree holder. The 2nd J.Dr filed counter affidavit, whereas J.Drs.1 and 3 adopted the same. In view of the undertaking affidavit, the learned Principal Senior Civil Judge closed the petition with the said observations. The facts would further reveal that to evade their liability, though, the property, in fact, stands in the name of 1st J.Dr, the 2nd J.Dr alone executed a sale deed in favour of the third party. When the decree holder filed E.P.No.7 of 2005, the third party filed E.A.No.44 of 2006 requesting the Court to adjudicate the claim and to raise attachment dated 24.07.2005 in E.P.No.7 of 2005.

The third party examined himself as PW.1, besides examining one Mattapalli Chalamayya as PW.2, whereas the decree holder examined himself as RW.1 and marked Ex.A1 – registered sale deed dated 25.01.2003. Exs.R1 to R8 were marked on behalf of the decree holder.

Admittedly, the sale deed - Ex.A1 executed by the 2nd J.Dr in favour of the third party was subsequent to unconditional undertaking given by the J.Drs. The only ground on which the third party claimed right over the property is that the unconditional undertaking given by the

J.Drs would not amount to attachment and the remedy for breach thereof is to proceed against the J.Drs by taking out contempt proceedings and the sale under Ex.A1 does not get vitiated, which is disputed by the decree holder.

The Executing Court, having analysed the evidence on record, formulated the point for consideration, and then referring to the ruling relied on by the third party in **Abdul Jalal v. M/s. Mariya Financiers and others**¹ and holding that the facts therein are not applicable to the case on hand and also referring to the ruling in **Chinnasamy v. Subakmui Guiecha**², held that the undertaking given by the J.Drs operates as an order of attachment under Section 64 CPC and the alienation covered under Ex.A1 was since subsequent to the undertaking, the same cannot be sustained in law. The executing Court also referred to the decision in **Tammana Suryanarayana v. Parachuri Chiranjeevi**³, wherein it was held that the attachment was not necessary when undertaking was filed and when the Court accepts the undertaking, then its order amounts in substance to an injunction restraining the party from acting in breach thereof and violation of an undertaking given to the Court is punishable in contempt. The learned Executing Court then examined the provisions of Section 64 CPC with reference to an undertaking given amounting to attachment before judgment and whether it falls within the purview of prohibition under Section 64 CPC.

¹ AIR 2002 Kerala 276

² AIR 2003 Madras 46

³ 1996 (2) ALT (4)

The Executing Court, finding that respondent No.3 therein i.e., J.Dr.No.2 executed Ex.A1 sale deed in his individual capacity and, therefore, it cannot be construed that J.Dr.No.1 executed the sale deed on behalf of other J.Drs and, ultimately, disbelieved that the property was sold in representative capacity and accordingly dismissed the E.A. The said order and decree are under challenge herein and the main question is already adverted to hereinbefore.

Heard Sri K.V. Subrahmanya Narusu, learned counsel for the appellant, and Ms. Goda Rama Lakshmi, learned counsel for respondent No.1.

Learned counsel for the appellant would submit that the unconditional undertaking given by J.Drs cannot be brought within the fold of Section 64 of CPC. He placed reliance in **M. Marathachalam Pillai v. Padmavathi Ammal**⁴, wherein it was observed in paragraph Nos.'2' and '3' thus:

“2. When property is attached in execution of a decree, any private transfer of that property contrary to such attachment is by Section 64 declared void as against all claims enforceable under the attachment. For the bar of Section 64 to operate, there must however be an effective attachment. Under Order 21, Rule 54, Code of Civil Procedure (as modified by the High Court of Madras) reads as follows:

‘(1) Where the property is immovable the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and

⁴ 1971 (3) SCC 878

all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode. A copy of the order shall be affixed on a conspicuous part of the property and on conspicuous part of the Court house. Where the property is land paying revenue to the Government a copy of the order shall be similarly affixed in the office of the Collector of the district where the land is situated. Where the property is situated within the Cantonment limits, the order shall be similarly affixed in the office of the Local Cantonment Board and the Military estate officers concerned, and where the property is situated within the limits of the Municipality, in the office of the Municipality within the limits of which the property is situated.

(3) The order of attachment shall be deemed to have been made as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2) whichever is the earlier.'

3. The rule requires that the attachment shall be proclaimed at some pace on or adjacent to the property by beat of drum or other customary mode; a copy of the order shall be affixed on a conspicuous part of the property and where the property is situated within the limits of a Municipality a copy of the order shall be affixed in the office of the Municipality within the limits of which the property is situated. The High Court of Madras held that there had been no effective attachment because there had been no proclamation by beat of drum as required by sub-rule (2) of Rule 54 of Order 21, and a

copy of the order was not affixed in the office of the Municipality.”

He further relies in **Noorali Babul Thanewals v. K.M.M Shetty**⁵.

Mainly what has been observed by the Honourable Apex Court in paragraph No.‘11’ thus:

“When a court accepts an undertaking given by one of the parties and passes orders based on such undertaking, the order amounts in substance to an injunction restraining that party from acting in breach thereof. The breach of an undertaking given to the Court by or on behalf of a party to a civil proceedings is, therefore, regarded as tantamount to a breach of injunction although the remedies were not always identical. For the purpose of enforcing an undertaking that undertaking is treated as an order so that an undertaking, if broken, would involve the same consequences on the persons breaking that undertaking as would their disobedience to an order for an injunction. It is settled law that breach of an injunction or breach of an undertaking given to a court by a person in a civil proceeding on the faith of which the court sanctions a particular course of action is misconduct amounting to contempt. The remedy in such circumstances may be in the form of a direction to the contemnor to purge the contempt or a sentence of imprisonment or fine or all of them. On the facts and circumstances of this case in the light of our finding that there was a breach of the undertaking we think that mere imposition of imprisonment or fine will not meet the ends of justice. There will have to be an order to purge the contempt by directing respondent 1 - contemnor to deliver vacant possession immediately and issuing necessary further and consequential directions for enforcing the same.”

⁵ (1990) 1 SCC 259

He further relies in **Mohd. Aslam v. Union of India**⁶, wherein the expression of the Honourable Apex Court in paragraph No. '10' thus:

“The questions that therefore arise for consideration are:

(i) Whether the undertaking given by the Chief Minister before the National Integration Council which was in terms recapitulated and incorporated in the order dated 15.11.1991 of this Court could be said to be an undertaking given by the Chief Minister personally or was merely an undertaking on behalf of the U.P. Government;

(ii) Whether there was any construction of a permanent nature carried on the land in willful disobedience of the orders of the Court;

(iii) Whether these constructional activities were carried on by or at the instance of the State Government or its authorities or were done in connivance with and assistance and encouragement of the State Government; or were they carried out in spite of all reasonable steps taken in that regard by the State Government and the Chief Minister to prevent the same; and

(iv) Whether the State Government and the Chief Minister were not liable for contempt for any alleged willful disobedience of the orders of the Court.”

He also relies in **T. Suryanarayana v. P. Chiranjeevi**⁷ rendered by a learned Single Judge of this Court and the expression therein at paragraph Nos. '8' and '9' thus:

“Learned Counsel appearing for the respondents submitted that there is no positive order or injunction under Order 39 Rules 1 and 2. The undertaking making the order of the Court does not amount to an injunction, therefore, the

⁶ (1994) 6 SCC 442

⁷ 1996 (2) ALT 4

petition under Order 39 Rule 2-A of the Code of Civil Procedure to punish the respondents does not lie. He also submitted that if there is any violation of the undertaking and the respondents have alienated contrary to the undertaking, the alienation is *null* and *void* by virtue of Section 64 of C.P.C. Except that, there is no consequence for the violation of the order.

I am unable to agree with this contention. In *A.B. Gurumurthy Chetti v. Sella Perumal* (AIR 1936 Madras 651), Madras High Court held in similar circumstances as “the natural meaning of the order is that an attachment is not necessary because of the undertaking”. It also held “I hold that when a Court accepts an undertaking given by party, its order amounts in substance to an injunction restraining him from acting in breach thereof. The form only implies that the Court is prepared to deal with him honourably in the expectation that he will treat his undertaking as equivalent to an order of the Court. It does not seem to me to come with any grace from the mouth of the person who has given such an undertaking to say that because the Court was good enough to accept that undertaking and did not pass an order of its own, he is not in a position of a person bounded by the order of the Court.” In *Babulal Parekh vs. Lachminarayan Swalram and others* (AIR 1964 Orissa 53), the Orissa High Court held that a violation of an undertaking given to the Court is punishable in contempt and that it is well settled that the proceedings in contempt are quasi-criminal in nature and the order punishing the contemnors, generally speaking, should be treated as order in criminal cases. It is further held, that the Subordinate Courts have full jurisdiction and powers to proceed in contempt cases under Order 39 for violation of undertakings given to them and when a Court accepts an undertaking given by a party, its order amounts in substance to an injunction restraining him from acting in breach thereof.”

He also relies in **Rita Markandey v. Surjit Singh Arora**⁸, where a tenant gives an undertaking to the court to vacate the premises, breach thereof amounts to civil contempt and making a false statement before the Court that he had already vacated the premises would constitute criminal contempt for deliberately attempting to impede administration of justice and delaying delivery of possession. He further relies in **K.C.G. Verghese v. K.T. Rajendran**⁹. He also relies in **Y. Kesavulu v. T. Kalavathi**¹⁰ rendered by a learned Single Judge of this Court where this Court remitted the matter to the Court below for disposal afresh.

On the other hand, learned counsel for respondent No.1 would place reliance in **C. Singottaiyan v. K. Saravanan**¹¹. The learned counsel also relies in **C. Subramanian v. N. Chockalingam Asari**¹².

Instead of deliberating on what has been observed by the Honourable Apex Court and the learned Single Judge of this Court in the decisions relied on by the learned counsel for the third party - appellant, where the remedy of contempt against the violator has been spoken, it would be appropriate to refer to the judgment rendered by Madurai Bench of Madras High Court in **C. Subramanian (12 supra)**, as it clearly answers the present controversy. The facts therein would reveal that an undertaking was given by the 2nd respondent therein to the Court that he would not alienate the property. The line of decisions relied on by both sides would lay emphasis on that such an undertaking would

⁸ (1996) 6 SCC 14

⁹ (2003) 2 SCC 492

¹⁰ 2016 (6) ALD 286

¹¹ 2013 – 4 – L.W. 754

¹² 2011 SCC Online Mad 80

amount to order of attachment passed by the Court when accepted in Court. There cannot be any dispute in regard to the said proposition laid down by Madurai Bench of Madras High Court. In the very same judgment, the Madurai Bench, having found that the 2nd respondent alienated the property in favour of the appellant suppressing the undertaking given by him to the Court that he would not alienate the property and also suppressing the fact of attachment of the property, held that the appellant therein could not prevent the 1st respondent in executing the decree obtained in his favour. It would be appropriate to refer to the expression of the Madurai Bench in paragraph Nos. '2', '7' and '11' thus:

“2. The brief facts leading to the filing of this appeal are as follows:

(a) The first respondent herein filed a suit in O.S.No.190/2002 before the Second Additional Sub-Court, Tirunelveli on 20.05.2002 against the second respondent herein for recovery of a sum of Rs.1,17,530.20 with interest. He also filed an application in I.A.No.308/2002 for attachment of the Schedule property before judgment. It is admitted that the second respondent appeared through counsel and gave an undertaking on 29.05.2002 to the effect that he would not alienate the property. On the basis of the said undertaking, the application in I.A.No.308/2002 was closed on 04.07.2002.

(b) The first respondent made a paper publication on 23.05.2003 about the aforesaid undertaking given by the second respondent. Since the first respondent apprehended that the second respondent had an intention to alienate the property, despite the undertaking, he filed another application on 29.08.2003 in I.A.No.399/2003 for attachment.

(c) The Trial Court passed an order of attachment on 03.09.2003 in I.A.No.399/2003 and the attachment was made absolute on 16.09.2003. Later, the suit was decreed on 09.12.2005.

(d) Based on the decree, the first respondent filed a petition in E.P.No.165/2006 in O.S.No.190/2002 before the Sub-Court, Tirunelveli against the second respondent for bringing the Schedule property for sale.

(e) When the sale notice was affixed on the Schedule property on 31.07.2006, the appellant herein filed an application in E.A.No.952/2006 in E.P.No.165/2006 in O.S.No.190/2002 under Order 21 Rule 58 and 151 C.P.C. seeking declaration that he has title over the property and to raise the attachment. The claim of the appellant was on the ground that he was a bonafide purchaser and that he was not aware of the undertaking given by the second respondent. The appellant also claimed that when the second respondent executed the sale deed on 07.08.2003 in favour of the appellant, attachment was made only on 03.09.2003 and that therefore, it could have no effect. But the Trial Court rejected the claim made by the appellant vide order dated 12.10.2007.

(f) Thereafter, the appellant filed a Civil Miscellaneous Appeal in C.M.A.No.64 of 2007 before the First Additional District, Tirunelveli. The same was dismissed on 14.10.2009 confirming the order dated 12.10.2007 passed in E.A.No.952/2006 in E.P.No.165/2006 in O.S.No.190/2002. Challenging the same, the present Civil Miscellaneous Second Appeal is filed.

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7. The reliance placed on by the learned counsel for the appellant on the judgment of the Honourable Apex Court in *Hamda Ammal v. Avadiappa Pathar* reported in 1991 (1)

SCC 715 : 1991-2-L.W. 110 is of no use as it was decided prior to the introduction of sub-section 2 to Section 64 CPC. In fact, after insertion of sub-section 2 to Section 64 CPC, this Court considered the effect of Section 64 (2) CPC in the judgment in *Ramasamy Raja v. P. Subbayya Pillai* reported in 2005 (3) CTC 640 : 2005-3-L.W. 186 and held that only those transfers that were made pursuant to registration prior to attachment would be saved. Hence, I do not find any infirmity in the orders of the Courts below in holding that since the registration took place only on 30.09.2003 subsequent to the attachment on 03.09.2003, the alienation of property is void as per Section 64 (2) CPC. The appellant could not claim any relief against the first respondent contending that he was a bonafide purchaser. If the second respondent alienated the property in favour of the appellant suppressing the undertaking given by him to the Court that he would not alienate the property and also suppressing the fact of attachment of the property, he would claim damages or any other appropriate relief against the second respondent. The appellant could not prevent the first respondent in executing the decree obtained in his favour. Accordingly, issue No.1 is answered in favour of the first respondent.

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11. Further, this Court also considered the effect of undertaking given by a party in the judgment in *A.B. Gurumurthi Chetty v. Sella Perumal Pillai* reported in AIR 1936 Madras 651 : (1936) 44 L.W. 714 in the following words:

“....Soon after the filing of the suit, the plaintiff applied for attachment before judgment of a certain sum of money lying with the Public Works Department to the credit of the defendant. In that connection the defendant filed an affidavit on 29th November 1933 undertaking to

draw the bill amount and to deposit the same in Court pending disposal of this petition without utilizing it for his other purposes. The plaintiff was not prepared to accept this undertaking because he was not sure what the defendant would do once he drew the money. That this apprehension was well founded is shown by the events that have subsequently happened. When the attachment application came on for orders before the Court on 29th itself, it appears that the defendant's vakil modified the undertaking in the affidavit and substituted an undertaking not to draw the cheque amount pending further orders of the Court on the petition. The vakil took care to add that as the party was not present in Court then, this undertaking was given by him under instructions from the party. The Court recorded the undertaking and on 21st December 1933 an order was passed in the following terms: "Pleaders heard. Not pressed in view of the undertaking already given by defendant. Dismissed."

I may at this stage dispose of a contention advanced by Mr. Narayanaswami Iyer on behalf of the petitioner that the undertaking given by the defendant or his vakil could enure only pending the disposal of the attachment petition and with the dismissal of the petition on 21st December, 1933 the undertaking itself came to an end. I am unable to accept this contention because it will not be a reasonable or even an intelligible construction of the order. The natural meaning of the order is that an attachment is not necessary because of the undertaking given."

Hence, those judgments squarely apply to the facts and circumstances of this case and that therefore, there is no error committed by the Courts below in holding that the second respondent is bound by his undertaking and that he could not validly alienate the property after giving an undertaking to the

Court. Accordingly, issue No.2 is also answered in favour of the first respondent.”

Nothing more is required to hold that the submissions made by the learned counsel for the appellant – third party lack merit. No doubt, for violation of undertaking, the remedy of proceeding against the violator in contempt proceedings cannot be disputed. That is not the only remedy available and, thereby, the third party cannot prevent the decree holder in executing the decree passed against him as held in **C. Subramanian (12 supra)**. In fact, the Madurai Bench of Madras High Court also relied on the rulings in **Hamda Ammal v. Avadiappa Pathar**¹³ and **Bank of Baroda v. Sadruddin Hasan Daya**¹⁴.

Hence, the present appeal is dismissed for want of merit. No order as to costs.

Miscellaneous applications, pending if any, shall stand closed.

JUSTICE A.SHANKAR NARAYANA

28.06.2018

v v

¹³ 1991 (1) SCC 715

¹⁴ AIR 2004 SC 942