

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 15.04.2019

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.S.A.No.24 of 2008 &
M.P.No.1 of 2008

1. D. Vasudevan
2. V. Suseela

..Appellants/Appellants
/Petitioners

-VS-

1. S. Duraisamy ..1st Respondent/1st Respondent
/Assignee D.Hr.

2. Lakshmi ..2nd Respondent/4th Respondent
/2nd Defendant Judg.Deb.

3. Chennimalai Gounder

4. Ponnammal

5. Samiyathal

6. Rajamani

..Respondents 3 to6/Respondents 5 to 8
LRs of Plaintiff

7. P. Kumar

8. P.Murugesan

9. Saraswathi

10.Poonkodi

..Respondents 7 to 10/ Respondents 9 to 12
LRs of D3

Prayer: Civil Miscellaneous Second Appeal filed under Order 21, Rule58, r/w.Section 100 of CPC against the judgment and decree dated 01.03.2006 made in CMA.No.11 of 2002 on the file of the Principal District Judge Court, Erode, confirming the fair and decreetal order dated 02.07.1990 made in E.A.No.173 of 1997 in EPR.No.22 of 1994 in OS.No.705 of 1990 on the file of the First Additional Sub Judge, Erode.

For Appellant : Mr.N. Manokaran

For Respondent : Mr.R.Parthsarathy for R1

JUDGMENT

The Present Civil Miscellaneous Second Appeal is preferred against the judgment and decree dated 01.03.2006 made in CMA.No.11 of 2002 on the file of the Principal District Judge, Erode, confirming the fair and decreetal order dated 02.07.1990 made in E.A.No.173 of 1997 in EPR.No.22 of 1994 in OS.No.705 of 1990 on the file of the First Additional Sub Judge, Erode.

2. The appellants are the objectors to the execution petition filed by the 1st respondent.

3. Originally, a suit was filed by one Nachimuthu Gounder for recovery of money against the 2nd respondent and one Periasamy (deceased) in O.S.No.705 of 1990 on 11.12.1990. The suit was decreed on 8.3.1993. The 2nd respondent Nachimuthu Gounder has assigned a decree in favour of 1st respondent Duraisamy, who filed an Execution Petition in EPR.No.22 of 1994 before the Execution Court for attachment and sale of the property. During the pendency of Execution Petition, the appellants filed Execution Application in E.A.No.173 of 1997 under Order 21, Rule 58 CPC claiming title to the property and prayed for raising the attachment.

4. It is the case of the appellants that they have purchased the property now under attachment on 14.9.1990 vide document No.705 of 1990 for a sum of Rs.70,000/-. Thereafter, one Nachimuthu has filed a suit for recovery of money and obtained a decree in the year 1993. After obtaining the assignment of the decree, the 1st respondent filed execution petition for attaching the property to realise the decree amount.

5. According to the appellants, even before the institution of the suit on 11.12.1990, the appellants have purchased the property on 14.9.1990. Thereafter, the suit property underwent mutation of revenue records and the property is under continuous, peaceful possession and enjoyment of the appellants. Any suit instituted after date of purchase of the property and any decree for recovery of money will not bind the appellants herein. Therefore, they would claim that the order passed by the execution Court is not binding on the appellants.

6. Heard both sides and perused the materials available before this Court.

7. The appeal is admitted on the following substantial question of law;

'Whether the order of attachment dated 7.12.1994 would retrospectively invalidate the sale deed dated 14.9.1990 made in favour of the appellant herein especially when the sale made before and subsisting even before the date of filing the suit.'

8. From the pleadings and materials, it is admitted that the appellants have purchased the property for a valid consideration on 14.09.1990, whereas the suit was laid for recovery of money by one Nachimuthu Gounder for recovery of money against the 2nd respondent and one Periasamy (deceased) on 11.12.1990, i.e., institution of suit itself was after three months from the date

of sale of the property and there was no attachment before judgment during the pendency of the suit. The suit was decreed on 8.3.1993. Thereafter the decree was assigned to the 1st respondent who filed the execution petition in the year 1993 and obtained order of attachment of the property in 1994.

9. It has to be seen whether the attachment is valid and binding on the appellants herein.

10. On the date of decree, the suit property did not belong to the 2nd respondent and Periasamy. Further, on the date of attachment also, 2nd respondent and Periasamy/Judgment Debtors did not have any valid title over the same. In that event, the order of attachment made by the Execution Court is not sustainable. Whereas the Lower Appellate Court, considering the judgment of this Court in AIR 1972 Madras 187 (The Official Assignee vs. Tehmina Dinshaw Tehrani and another) has held that the 4th respondent with an intention to defraud the decree holder has sold the property. It is seen that the principle adopted by the Court relates to an insolvency proceedings and any transaction, which has happened two years prior to the date of adjudication is held to be fraudulent and null and void. But in the instant case, there is no such insolvency proceedings and the 2nd respondent filed the suit on 11.12.1990 after the sale of schedule property and that sale of property was not challenged at any point of time. The suit was itself laid for recovery of money.

11. The appellants have filed petition under Order 21, Rule 58 CPC. Sub Clause 2 of Rule 58 CPC clearly specifies that all questions relating to right, title or interest of the property attached shall be dealt with by the execution court itself and not by a separate suit. In the instant case, the records clearly go to show that the right, title of the property is vested with the appellants even before institution of the suit. Therefore, the execution court, after determining title in favour of the appellants, has erroneously held that the conveyance was fraudulent without any legal evidence to prove the same.

12. Therefore, this Court is inclined to set aside the order passed by the Execution Court. The Civil Miscellaneous Second appeal is accordingly allowed and substantial question of law is answered in favour of the appellants. No costs. Consequently, connected M.P.No.1 of 2008 is closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Erode,

2. The First Additional Sub Judge,
Erode.

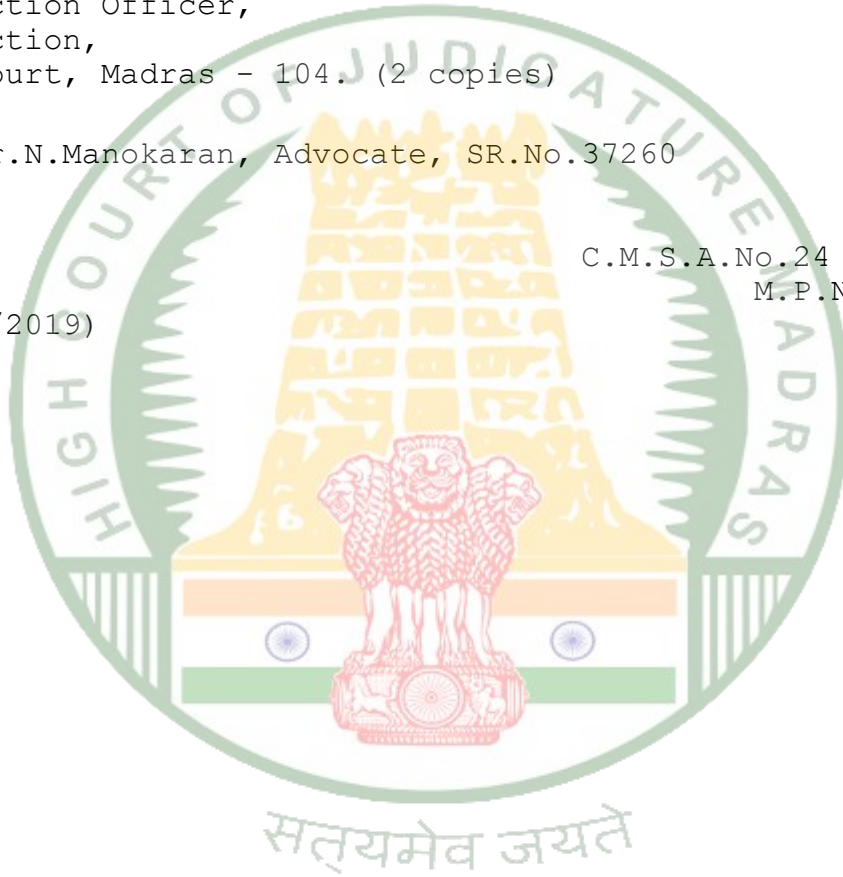
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+1cc to Mr.N.Manokaran, Advocate, SR.No.37260

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M.P.No.1 of 2008

Kak(22/07/2019)



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