

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.03.2019

CORAM
THE HONOURABLE Mr.JUSTICE N.SATHISH KUMAR

C.R.P.(NPD)No.1494 of 2009
and M.P.No.1 of 2009

K.A.Leyagath Ali ...Petitioner

Vs.

1.Sri Sendhur Traders,
A Registered Firm,
Rep.by its Partner,
P.T.Saravanan.

2.Ms.S.Rani ...Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the decretal and fair order passed by the Additional District Judge-cum-Fast Track Court No.1, Erode in C.M.A.No.3 of 2007, dated 14.12.2007 and restore the decretal and fair order passed by the 1st Additional Subordinate Judge, Erode, dated 27.12.2005 in E.A.No.654 of 2004 in E.P.No.144 of 2004 in O.S.No.14 of 2002.

For Petitioner : Mr.Satish Parasaran
Senior Counsel for
Mr.T.T.Ravichandran

For Respondents : Mr.T.Murugamanickam
Senior Counsel for
Mr.V.Rajesh for R1
No appearance for R2

ORDER

The Civil Revision Petition has been filed against the judgement of the first appellate Court in C.M.A. No.3 of 2007 filed by the first respondent herein under Order 21, Rule 58 of C.P.C., questioning the correctness of the order passed by the trial court raising the order of attachment of the property passed by it in the suit.

2.The brief facts leading to filing of this revision petition is as follows :

The first respondent herein, as plaintiff, filed a suit against the second respondent herein, for recovery of money on the strength of commercial transaction between them. Pending disposal of the above suit the first respondent has also filed an application under Order 38 Rule 5 and Section 151 of C.P.C, for attachment of the property owned by the second respondent herein, before judgement. In the above suit, it appears that the second respondent herein/ defendant was set ex-parte and an ex-parte decree came to be passed on 28.4.2002. Consequently, the ex-parte order was also made absolute on the same day. It is relevant to note that the suit was originally filed by the first respondent herein on 21.12.2001 and at the time of taking the suit for hearing, there was no order of attachment passed.

Subsequently an exparte decree was passed on 28.04.2002 and thereafter, the plaintiff has filed the application seeking attachment of the property of the second respondent herein/defendant.

3. According to the revision petitioner, he has purchased the property in question from the second respondent herein/defendant on 12.07.2001 for a valuable sale consideration by means of two registered sale deeds. After sale, the first respondent/plaintiff and second respondent/defendant colluded together and filed the present suit to defeat the right of the revision petitioner. On coming to know about the filing of the suit and the order of attachment passed thereon on 06.01.2005, the Revision Petitioner filed a Petition in E.A.No.654 of 2004 in E.P.No.144 of 2004 in O.S.No.14 of 2002 under Order 21 Rule 58 and Section 151 of Code of Civil Procedure to raise the order of attachment. According to the revision petitioner, on the date when the order of attachment was passed, he was the owner of the property and the order of attachment has prejudiced him. The Execution Court perused the various documents and allowed the Execution Application filed by the Revision Petitioner and raised the order of attachment by an order dated 27.12.2005 passed in EA No. 624 of 2004 in EP No. 144 of 2004 in OS No. 14 of 2002. Aggrieved by the same, the first

respondent herein has filed C.M.A. No. 3 of 2007. The First Appellate Court allowed the appeal on the ground that the revision petitioner herein is not a bonafide purchaser of property and allowed the appeal. Aggrieved by the same, the present revision has been filed.

4. Heard Mr.Satish Parasaran, learned Senior Counsel for the petitioner and Mr. T. Murugamanickam, learned Senior Counsel appearing for the first respondent and perused the materials available on record.

5. It is the contention of the learned Senior Counsel for the petitioner that on the date of alleged attachment, the second respondent herein/defendant did not have any title to the property. The Execution Court has rightly found that the attachment is not proper, whereas the first appellate Court without any materials, has gone beyond the scope of the Petition filed under Order 21 Rule 58 of CPC and concluded that the revision petitioner is not in possession for the property and therefore, the order passed by the Executing Court lifting the order of attachment is not proper. Further, the First Appellate Court went further and held that the sale in favour of the revision petitioner by the second respondent/ defendant is not valid under Section 128 of Transfer of Property Act. It is the further

contention that the question of valid transaction is a matter of separate suit and there is no issue framed in the petition with regard to the bonafide of purchaser. When no such issue has been framed in the petition, only on the basis of exparte decree passed by the trial Court the decree holder cannot challenge the sale in favour of the revision petitioner in the execution proceedings. The first appellate Court assumed the jurisdiction by itself had held that the sale is not a valid one. Such finding of the First Appellate Court is not in accordance with law and therefore, the learned Senior counsel prayed for allowing this Revision.

6. The learned Senior Counsel appearing for the first respondent/Plaintiff would submit that the first appellate Court incidentally decided the issue that the sale is sham and nominal and it does not call for any interference by this Court.

7. On perusal of the entire order, it is to be noted that Section 64 of Cr.P.C deals with any private alienation of property after attachment is void. The above section states that where an attachment of property made, any private transfer or delivery of the property attached shall be void as against all claims enforceable under attachment. The proviso of the Section

also makes it very clear that Section 64 (1) of C.P.C will not apply to the transaction took place before such attachment. Therefore, it has to be established before the Court that such sale has been taken place subsequent to the attachment of sale to avoid the same. Even assuming that the sale in favour of the revision petitioner herein has been made in order to defeat the right of the decree holder, such sale is only voidable. As long as it is not avoided the title of the purchaser cannot be questioned later. The decree holder can file a suit or application as required under Section 53 of Transfer of Property Act, where as in their case no such exercise made by the decree holder to avoid such sale which happened prior to filing of suit.

8. Admittedly in this case, suit has been laid only on 21.12.2001 and prior to that the revision petitioner has purchased the property on 12.07.2001 from the second respondent/defendant. On the date of judgement in I.A.No.12 of 2002, the revision petitioner had title in the suit property. Therefore, the attachment of the property to which the revision petitioner is the title holder cannot be made. The Execution Court has rightly found that the property was already purchased by the revision petitioner on 12.07.2001 much before the Suit, which was filed on 21.12.2001. As long as the sale transaction is not avoided by the creditors, such transaction is valid. The first

appellate Court without deciding the issue, whether the transferee/revision petitioner is a bonafide purchaser of the property for a valuable sale consideration or not has simply held that the suit transaction is not valid.

9. It is seen that even on 25.12.2000, the second respondent herein/defendant had executed a settlement deed in favour of her sons and subsequently cancelled it and thereafter, sale deed has been executed in favour of the revision petitioner on 12.07.2001 for a valid sale consideration. Thus, after revoking the settlement deed executed in favour of her son, the second respondent herein/defendant had executed sale in favour of the revision petitioner jointly along with her sons. These are all the admitted facts and the first appellate Court, erroneously dismissed the application filed by the revision petitioner for raising the order of attachment. As long as the sale is not avoided in terms of Section 53 of Transfer of Property Act, decree holder cannot avoid such sale. The order of attachment originally made by the Court also not valid since on the date when attachment order was passed, judgement debtor did not have any right in the suit properties.

10. Hence, the Civil Revision Petition is allowed and the Judgement and Decree dated 14.12.2007 of the first appellate Court in CMA No. 3 of 2007

is hereby set aside and the decretal and fair order passed by the 1st Additional Subordinate Judge, Erode, dated 27.12.2005 in E.A.No.654 of 2004 in E.P.No.144 of 2004 in O.S.No.14 of 2002 is hereby restored. No costs. Consequently, connected miscellaneous petition is closed.

11.The learned Senior Counsel appearing for the first respondent submitted that the property was already put in auction and purchased by the auction purchaser and the amount also deposited in the Court. If the above statement is correct, then the Court shall refund the deposit amount with interest if any, to the auction purchaser.

06.03.2019

Internet : Yes / No
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To

- 1.The Additional District Judge-cum-Fast Track Court No.I, Erode.
- 2.The First Additional Subordinate Judge,
Erode.

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N.SATHISH KUMAR, J.

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