IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 19.06.2019

Judgment Pronounced on : 28.06.2019

CORAM :

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.604 of 2008
and M.P.No.1 of 2008
and M.P.No.2 of 2008 in MP.No.1 of 2008

1.Nataraja Naidu (Died) ..Appellant/1st Respondent/Plaintiff
2.N.Vaijainthimala
3.N.Aravindaraj
4.Thenral ..Appellants 2 to 4
(Appellants 2 to 4 are brought on record as LRS of the deceased sole appellant Vide order dated 04.6.2019 in CMP.No.11420, 11421 and 11423 of 2019 in SA.No.604/2008)

Vs

1.Soundararajan ..1st Respondent/Appellant/1st Defendant
2.M.Sundaresan
3.A.Gnanaprakasam
4.S.Arul ..Respondents 2 to 4/Respondents 2 to 4/ Defendants 2 to 4

Prayer : Second Appeal filed under Section 100 of CPC against the judgment and decree passed of the learned Principal Subordinate Judge, Thiruvannamalai in A.S.No.98/2006 dated 26.10.2007 reversing the judgment and decree of the learned Additional District Munsif, Thiruvannamalai in O.S.No.464/2002 dated 28.09.2006.

For Appellants : Mr.A.K.Kumarasamy, Senior Counsel
Assisted by Mr.S.Kaithamalai Kumaran

For Respondents : Mr.R.Rajarajan [R1]
R2 & R3 - Exparte
R4 - Dismissed Vide order dt. 6.7.2018

JUDGMENT

The first appellant herein has laid a suit for setting aside a Court auction-sale. The suit came to be decreed, but the first Appellate Court has reversed the same. Hence, the plaintiff is before this Court.

2.1 The suit property, which was described as a house site when the present suit was laid, was purchased by the plaintiff from the second defendant through his Power of Attorney, namely the defendants 3 and 4, on 13.8.1999, under Ext.A1, sale deed. He is a bonafide purchaser for value, and later he came to know that the property has been sold in a Court auction, and delivery has been granted to the first defendant. The rest of the allegations are that the plaintiff learnt that the first defendant had laid a suit for recovery of money against the second defendant in O.S.No.272/99 on the file of District Munsif Court, Thiruvannamalai. In that suit, the first defendant had taken out I.A.No.684/99 for attaching the suit property, before judgment. The attachment was ordered on 27.07.1999 and came to be effected on 15.08.1999. Two days prior to the effecting the attachment, i.e., on 13.08.1999, the plaintiff had purchased the present suit property.

2.2 The short point on which the plaintiff has laid the suit is that on the date when the property was attached, there is no title vested with the second defendant, in order the property could be subsequently sold in the Court auction.

2.3 The trial Court has accepted this contention and decreed the suit, whereas the first appellate Court has held that the plaintiff is not a bonafide purchaser and dismissed the suit. Aggrieved by the decree of the first appellate Court, the plaintiff is before this Court in the second appeal.

3. The appeal was admitted on the following substantial questions of law :

1. Is the finding of the Lower Appellate Court that an order of attachment of a property takes into effect from the date of order, is legally sustainable when it has been held that to have an effective attachment, all the formalities required by law (under Order 21 Rule 54 C.P.C.) must be followed?
2. Is the Lower Appellate Court justified in rendering a finding to the effect that Ex.A.1 sale is the result of fraud practised by plaintiff and defendants 2 to 4 overlooking that there is no pleading or proof of fraud by the contesting 1st defendant in this connection?

4. The learned counsel for the appellants to start with, made his job easy by just presenting the date of attachment and date of sale, to bail out his title from the effect of the Court auction sale.

Date	Exhibit	Events
13.08.1999	A1	Sale Deed executed by defendants 3 and 4 as the Power of Attorney of the second defendant.
15.08.1999	B1	Attachment before judgment effected and made absolute in I.A.No.684/1999 in O.S..272/1999

Therefore, even going by the first defendant's statement, the plaintiff has purchased the property before the attachment was made absolute.

5.1 The learned counsel for the respondents came forward with two alternate arguments that he canvassed simultaneously:

a) That attachment was ordered on 12.08.1999 and that Ext.A1 sale was obtained by the plaintiff only on 13.8.1999. Therefore, the sale of the suit property to the plaintiff is in violation of the Order of attachment which in law freezes the power of alienation of the Judgement Debtor.

b) Ext.A1 sale is also a fraudulent sale that may be established by the following set of facts :

Date	Exhibit	Event
11.08.1999	A2	Power of Attorney executed by the second defendant in favour of defendants 2 and 3 and registered at Tirupattur Sub Registry
12.08.1999		The above said Power of Attorney registered as Document No.236/1999 at Tirupattur Sub Registry
13.08.1999	A1	Sale deed in favour of the plaintiff.

Total consideration fixed is Rs.77,000/-, but only Rs.2,500/- paid and the balance was paid in three cheques.

5.2 The learned counsel would argue that the suit in O.S.No.292/1999 was laid in July 1999, and an Order of attachment before judgment came to be passed in I.A.684/1999. This is the setting in which Ext.A1, sale deed was executed. There are three aspects that renders Ext.A1 suspicious :

a) An undue hurry was showed in executing the Power of Attorney, having it registered on the following day, and executing Ext.A1 sale deed on the very next day.

b) For a property situated in Tiruvannamalai, Power of Attorney was executed in Tirupattur, and the purchaser of the property namely the plaintiff did not even wait for obtaining the Power of Attorney document before choosing to purchase the property.

c) When the total consideration is fixed at Rs.77,000/-, the plaintiff has paid only Rs.2,500/-, As to the remainder the sale deed states that 3 cheques have been issued, two of them for Rs.30,000/- and another for Rs.15,000/- .

Taken the conduct of the plaintiff wholesomely, it hardly shows that the plaintiff had conducted himself in a manner consistent with the way a prudent man of intelligence would generally conduct his affairs. And if this is juxtaposed with the money suit in O.S.272/99 instituted by the first defendant against the second defendant, it would emerge that Ext.A1 sale was executed only to defraud the creditor, that the first defendant is. Therefore, this sale will be hit by Section 53 of Transfer of Property Act, 1882. Reliance was placed on the authorities in C.Abdul Shukoor Saheb Vs. Arji Papa Rao (deceased) [1963 AIR (SC) 1150] and Arya Engineering Vs. Corporation Bank [1997 (II) CTC 83].

6.1 Turning to the question whether Ext.A1 sale deed is made in violation of the order of attachment before judgment in I.A.No.684/99 in O.S.No.272/99 concerned, it is not just the date on which it is effected, that matters. While the plaintiff says it was effected on 15.08.1999, i.e., couple of days after Ext.A1 sale deed (13.08.1999), according to the first defendant, it was effected on 12.8.1999, a day prior to Ext.A1. Under Order 38 Rule 11(B), the order of attachment passed under Order 38 Rule 5, "shall be communicated to the Registered Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such order, is situate". Interpreting this provision, this Court in Tmt. R. Umayal Vs R.S.Pillai [2000 (2) CTC 524], Humba Hema Goods Vs Tamil Nadu State Transport Corporation (CBE) LTD [2012(1) CTC

407, both of which are relied on in Vellapandi (died) & Others Vs K.S. Maheswari & another [CDJ 2017 MHC 2886] has held that the procedural compliance under Order 38 Rule 11B is mandatory for effecting attachment, and that a default in complying with Order 38 Rule 11B requirement would save all alienations made by the defendants. This view apply squarely to the facts of this case as there is nothing on record to indicate that the Order of attachment was communicated to the Sub Registry even if it were to be presumed that the Court has passed the said order on 12-08-1999, a day prior to the plaintiff had obtained Ext.A1, sale deed on 13.08.1999. Therefore, as to the first leg of respondents/defendants' resistance, the appellants succeed.

6.2 Since Ext.A1 sale deed has survived the first line of attack on its validity, it is now time to check if it survives the allegation that it is fraudulently executed with a view to defraud the creditor of the vendor in Ext.A1. Sec. 53 of the Transfer of Property Act which deals with fraudulent transfers is extracted to the extent required :

> 53. Fraudulent transfer :- (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option on any creditor so defeated or delayed.
>
> Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration
>
> …… …… …… …… …… ……
> …… …… …… …… …… ……
>
> (2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee."

The provision provides two significant components to a fraudulent transfer. First it must be one that must be done with an intent to defeat or delay the creditor; and (b) that a bonafide transferee for value, is saved even if there was a fraudulent intent behind transfer of property.

7. Fraud does not parade with label on its face, but masquerade with a deceptive innocence. Whether an act is a fraudulent act has to be proved by a strong set of evidence, since in law, a man is presumed to intent the natural consequence of his act. In Minakumari Vs. Bijoy Singh [AIR 1916 PC 238 : 44 IA 72], it is pointed out that, however

suspicious a transaction may be, the Courts decision must rest not upon suspicion, but on legal grounds established by legal testimony. The point here is whether the first defendant has been able to establish the circumstances sufficient enough to lable Ext.A1 as a fraudulent transfer? The argument based on circumstances detailed in paragraph No.5.2 above, at the best may indicate that, the second defendant might have entertained a fraudulent intent to defeat or delay the first defendant, his creditor. Unless it is demonstrated the plaintiff has shared the same fraudulent intent, it would not be possible to hold that plaintiff was not a bonafide purchaser. It might to be true that from the timing of execution of the Power of Attorney and followed by its registration and leading to the execution of Ext.A1, sale deed might have assumed a 'Solomon Grundy, born on Monday, christened on Tuesday'.. pattern. But in law, the Court looks for evidence that establishes if a transferee under an alleged fraudulent transfer is privy to the fraud. On this critical aspect, the evidence is vacuous. It may be true that the plaintiff might have paid only Rs.2500/- towards sale consideration and the entire consideration might have not been paid. But in law non-payment of entire sale consideration will not ipso facto invalidate the very sale.

8. As already indicated, Court cannot suspect the transaction unless it is proved to be so. The presumption shall always be in favour of bonafide of a transaction, and it requires strong contrary evidence to tilt the probability in favour of one who alleges fraud. This is not achieved in this case.

9. In conclusion, this Court holds that the decree of the first appellate Court requires to be interfered with. The appeal is allowed and judgment and decree passed by the Principal Sub Court, Thiruvannamalai in A.S.No.98/2006 dated 26.10.2007 reversing the judgment and decree of the file of Additional District Munsif, Thiruvannamalai in O.S.No.464/2002 dated 28.09.2006, is set aside. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

1.The Principal Subordinate Judge,
   Thiruvannamalai.

2.The Additional District Munsif,
   Thiruvannamalai.

Copy to : The Section Officer
          VR Section, High Court, Madras.

+1cc to Mr.S.Kaithamalai Kumaran, Advocate Sr.No.53946

AKM/25.02.2020 /7P-5C/

Judgment in
S.A.No.604 of 2008