

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.07.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

CRP (PD)No.3410 of 2014

and

MP No.1 of 2014

V.Santhanam

.... Petitioner

versus

1. Uma Maheswari

2. Minor Kokulkrishnan

Minor represented by its Guardian / mother

1st respondent

.... Respondents

Civil Revision Petition filed under Section 115 of Civil Procedure Code to set aside the order dated 18-03-2013 and made in I.A. No.189 of 2013 in O.S. No.62 of 2013 on the file of the learned Subordinate Judge, Arni and allow this Civil Revision Petition.

For petitioner : Mr.M.Rajasekhar

For respondents : No appearance

ORDER

The instant Civil Revision Petition has been filed challenging the order, dated 18.03.2014 passed by the learned Subordinate Judge, Arni, in I.A. No.189 of 2013 in O.S. No.62 of 2013.

Brief facts leading to the filing of the instant Revision

Petition under Section 115 of CPC.

2. The petitioner is the plaintiff in the suit O.S. No.62 of 2013 filed before the learned Subordinate Judge, Arni seeking recovery of money against the respondents based on promissory notes executed by the respondents in favour of the petitioner. During the pendency of the suit, I.A. No.189 of 2013 was filed by the petitioner in O.S. No.62 of 2013 under Order 38 Rule 5 CPC, seeking attachment of two items of properties mentioned in the petition schedule. A counter affidavit was filed by the respondents in I.A. No.189 of 2013 on 20.09.2013, wherein they have given an undertaking in paragraph No.8 of the said counter that they shall not alienate the property referred to in the petition, pending disposal of the main suit. Before final orders could be passed in I.A. No.189 of 2013 by the Trial Court, it was brought to the notice of the Court by the petitioner / plaintiff that despite the undertaking given by the respondents that they shall not alienate the petition schedule properties, the respondents had alienated the first item of the petition schedule property on 27.12.2013 and a copy of the sale deed was also marked as Ex. P6 while I.A. No.189 of 2013 was being heard by the Trial Court.

3. The Trial Court by its order dated 18.03.2014 partly allowed I.A. No.189 of 2013, by ordering attachment of the second item of the petition schedule properties and disallowing the attachment in respect of item No.1 of the petition schedule property as the respondents have already alienated the same, pending disposal of I.A. No.189 of 2013. Aggrieved by the order, dated 18.03.2014 passed in I.A. No.189 of 2013 in O.S. No.62 of 2013, the instant Civil Revision Petition has been filed.

4. Heard Mr.M.Rajasekhar, learned counsel for the petitioner. Despite service of notice on the respondents, and their names having been printed in the cause list today, no one has entered appearance on their side.

Submissions of the learned counsel

5. The learned counsel for the petitioner submitted that despite an undertaking given on 20.09.2013 by the respondents, in their counter filed in I.A. No.189 of 2013, they have alienated the first item of the schedule property on 27.12.2013. According to him, despite clear violation of the undertaking, the Trial Court under the impugned order has ordered attachment only in respect of item No.2 of the

petition schedule and has not ordered attachment of Item No.1 since, the respondents have already alienated the said property. Further, he would submit that the market value of item 2 of the petition schedule property is only Rs.4,00,000/- and will not secure the claim of the petitioner / plaintiff in the suit, which is of a much higher value.

6. The learned counsel for the petitioner also drew the attention of this Court to a judgment of the learned Single Judge of this Court in the case of **Marimuthu and others versus Elango and others** reported in **(2006) 1 M.L.J. 199** and submitted that being Lis pendens, the alienation made by the respondents to a third party despite the undertaking given by them not to alienate the said property is hit by the Doctrine of Lis Pendens under Section 52 of the Transfer of Property Act.

7. The learned counsel for the petitioner also drew the attention of this Court to Section 53 of the Transfer of Property Act, 1882, relating to fraudulent transfer and submitted that since the respondents have violated their undertaking given to the Court by alienating item No.1 of the petition schedule property, it will amount

to fraudulent transfer, which the Trial Court under the impugned order has not taken note of.

DISCUSSION :

8. Admittedly, the suit filed by the petitioner / plaintiff is for recovery of money filed in the year 2013. In I.A. No.189 of 2013 in O.S. No.62 of 2013, the petitioner / plaintiff had filed an application under Order 38 Rule 5 CPC seeking attachment of two items of properties. A counter was filed by the respondents / defendants and in paragraph No.8 of the said counter they have given an undertaking that they shall not alienate the petition schedule properties, pending disposal of the suit. It is the case of the petitioner that despite the undertaking given by the respondents / defendants, they had sold item No.1 of the petition schedule property to a third party.

9. The Trial Court has considered all these aspects and only thereafter has partly allowed I.A. No.189 of 2013 in O.S. No.62 of 2013 by ordering attachment of item No.2 property alone and disallowing the attachment in respect of Item No.1, which has already been alienated by the respondents. In this revision, the petitioner has not impleaded the purchaser, who has allegedly purchased item No.1

of the petition schedule property from the respondents, Subsequent to theIR undertaking given by the respondents that they shall not alienate the said property to any third party, the name of the purchaser is also not disclosed by the petitioner. This Court with the materials available on record cannot adjudge as to whether the third party, who has purchased item No.1 of the petition schedule property from the respondents is a bonafide purchaser or not. The Civil Revision Petition is of the year 2014 and till date, no impleading application has been filed by the petitioner to implead the purchaser, who has purchased Item No.1 of the petition schedule property from the respondents, subsequent to the undertaking given by the respondents before the Trial Court that they shall not alienate the property. If at all the petitioner was a prudent litigant, he would have filed an application seeking for impleadment of the purchaser of Item No.1 of the petition schedule property either in the suit or atleast before this Court, in this Civil Revision Petition. But till date, no such impleading application has been filed by the petitioner to implead the said purchaser.

10. The judgment relied upon by the learned counsel for the petitioner reported in **(2006) 1 M.L.J. 1999 (Marimuthu and**

others versus Elango and others) is not applicable to the facts of the instant case and that was a suit for specific performance, whereas the instant suit is for recovery of money. Therefore, the question of Lis Pendens in a suit for recovery of money will not arise.

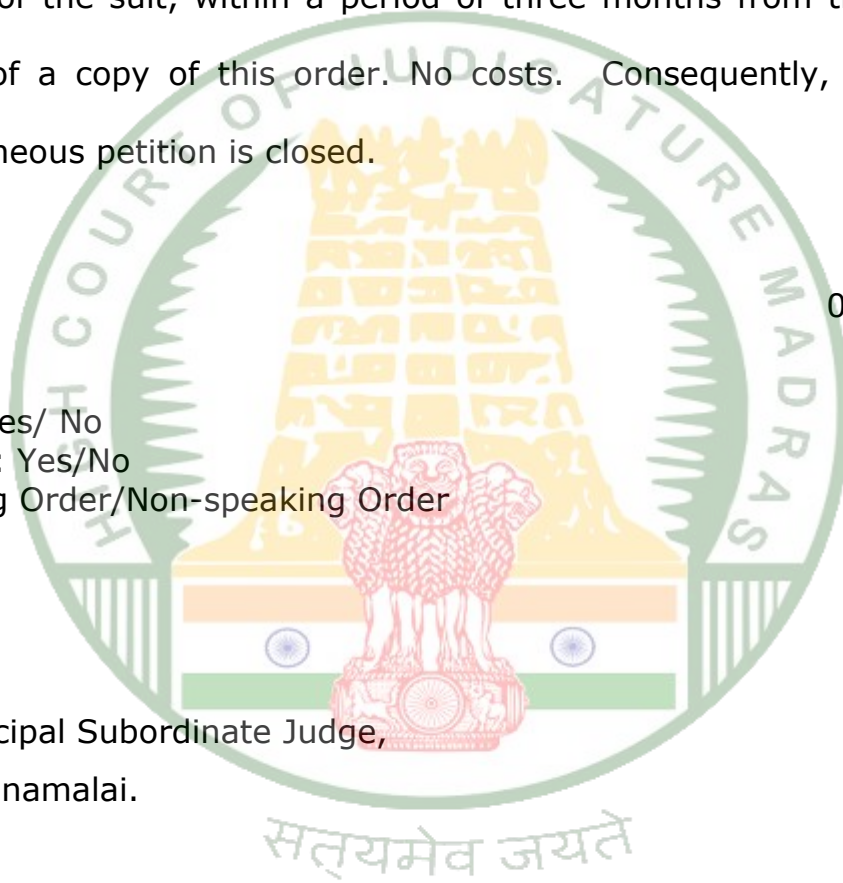
11. With regard to Section 53 of the Transfer of Property Act viz. Fraudulent Transfer, which the learned counsel for the petitioner would rely upon, the same is also not applicable to the facts of the instant case as there is no final adjudication given by any Court of law that the alienation made by the respondents / defendants subsequent to their undertaking given before the Trial Court is a fraudulent Transfer. There is also no finding that the said alienation has been done only to defeat or delay the creditors right. Admittedly, in the instant case two items of the properties are involved and the petitioner has got the benefit of attachment in respect of one of the items and only in respect of other item, the Trial Court has disallowed the attachment. The impugned order of attachment of one of the items of the properties was passed on 18.03.2014 and therefore, this Court cannot estimate the present market value of the said property as by now the value of the item No.1 of the suit property would have appreciated and it may be sufficient to secure the suit claim.

12. For the foregoing reasons, this Court is of the considered view that there is no merit in this Civil Revision Petition. However, due to long pendency of the matter, this Court directs the Trial Court to dispose of the suit, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

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Index: Yes/ No
Internet: Yes/No
Speaking Order/Non-speaking Order
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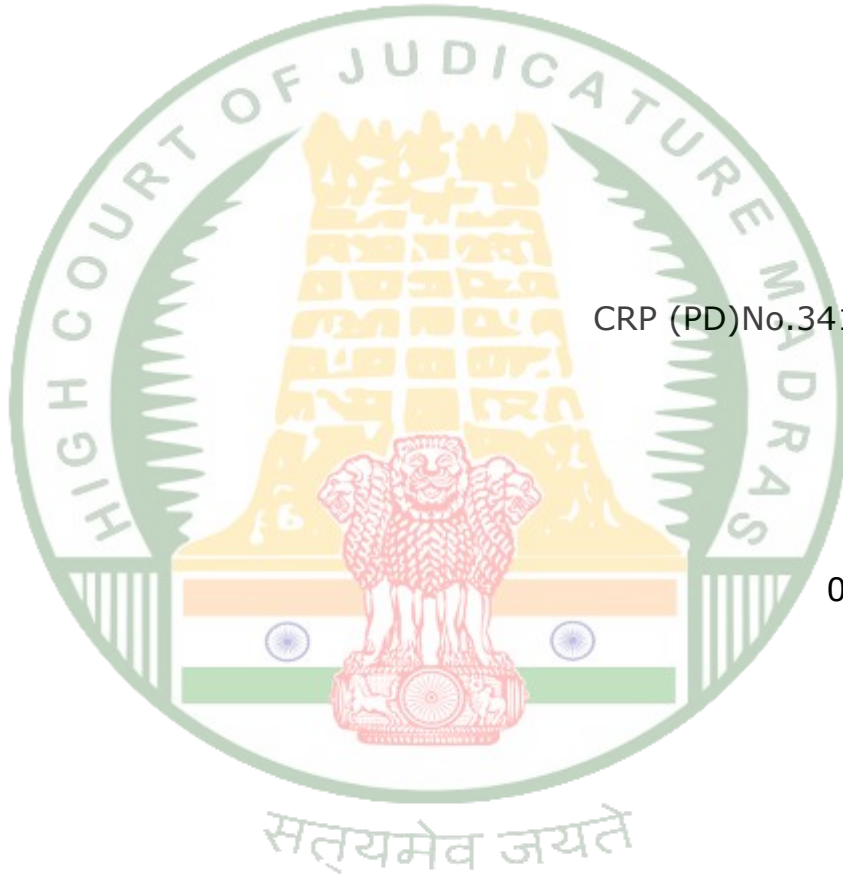
To
The Principal Subordinate Judge,
Thiruvannamalai.



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ABDUL QUDDHOSE, J.

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