

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.02.2019

Delivered on : 19.02.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.3092 of 2018

and

CMP.No.23522 of 2018

1.Venkatesh Coke and Power Limited
2.Ravi Agarwal
3.Arun Kumar Swarup ... Appellants

Vs.

M/s.Otto India Private Limited,
No.32, Ezra Street, 7th Floor,
Kolkatta-700 001
by transferee of the decree
M/s.Papathi Reals,
No.139, T.H.Road, Chennai-600 019
rep. by its Partner A.Naraynan. .. Respondent

Civil Miscellaneous Appeal filed under Order 43, Rule 1(ja) CPC
against the order dated 4.8.2018 passed in E.A.No.48 of 2017 in
E.P.No.128 of 2017 in Clcutta High Court in C.S.No.196 of 2005
on the file of the I Additional District Court, Thiruvallur.

For Appellants : Mr.M.V.Seshachari

For Respondent : Mr.M.Kalyanasundaram
Senior Counsel
for M/s.S.Ponjeganathan

JUDGMENT

This Civil Miscellaneous Appeal is directed against the
order dated 4.8.2018 passed by the learned I Additional District
Judge, Thiruvallur in E.A.No.48 of 2017 in E.P.No.128 of 2017 in
C.S.No.196 of 2005, dismissing the petition filed by the

appellant to set aside the ex parte order dated 22.10.2008.

2. The appellants are the judgment-debtors/defendants and the respondent herein is the decree-holder/plaintiff in E.P.No.128 of 2017 filed by the respondent.

3. Originally the Execution Petition was filed before the Principal District Court, Thiruvallur in E.P.No.12 of 2008. Pending Execution Petition, the appellants have filed petition in E.A.No.562 of 2016 under Order 21, Rule 106 CPC seeking to set aside the ex parte order dated 22.10.2008 passed in E.P.No.12 of 2008. Subsequently, the E.P.No.12 of 2008 was transferred to the file of the I Additional District Court, Thiruvallur and numbered as E.A.No.128 of 2017 and consequently, E.A.No.562 of 2016 was numbered as E.A.No.48 of 2017.

4. The appellants have filed E.A.No.48 of 2017 (E.A.No.562 of 2016) alleging that on 25.8.2016, when the workers of the first appellant were involved in the site preparation by way of cleaning bushes on the land, all of a sudden a some people attempted to enter into the premises claiming that one A.Narayanan had purchased the properties and the appellants should not do any work in the properties. According to the appellants, on an enquiry, they came to know that the properties were subject matter of attachment in Court proceedings in E.P.No.12 of 2008 and the appellants have resisted the attempt of the said persons of the respondent. Immediately, the appellants have engaged a counsel and obtained copy of the Execution Petition and found that the properties were attached pursuant to the order passed by the Court dated 22.10.2008 by setting them ex parte for their non-appearance. According to the appellants, no valid notice has been served upon them in the Execution Petition and only on 25.8.2016, they came to know about the pendency of the Execution Petition and filed petition to set aside the ex parte order dated 22.10.2008 within a period of 30 days. The appellants have got fair chance of success in the Execution Petition and the respondent is proceeding with the Execution Petition with sale of the properties without valid attachment over the same. Hence, the appellants prayed for setting aside the ex parte order dated 22.10.2008 passed in the Execution Petition.

5. Resisting the petition, the respondent filed counter stating that since the appellants have deliberately evaded service of notice in the Execution Petition, the Court has ordered substituted service and after effecting paper publication, the Executing Court called the appellants and set them ex parte and ordered attachment of the properties. The appellants are put to strict proof that only on 25.8.2016, they came to know about the pendency of the Execution Petition and

orders passed thereon. According to the respondent, the deponent of the affidavit Mr. Ravi Agarwal is the Director of M/s. Venkatesh Coke and Power Limited, having office at No. 6926A/D1, Chandrawal Road, New Delhi has cleverly, conveniently and deliberately with an intention to evade service of notice has returned the postal envelop sent to the said address with an endorsement "wrong address". It is stated that when the appellants are bent upon evading service of notice through fraudulent means, cannot turn back and say that there is no valid service of notices later on, which clearly shows that the appellants have approached the Court with unclean hands. It is also alleged in the counter that the conduct of the appellants for over 11 years and their lack of interest in discharging the loan with interest therein and even to contest the case by receiving notices from the Court is ample proof that the appellants are interested only to defraud the respondent by filing false affidavit, wasting the Court's time, abusing the process of law and frustrate the attempts of the respondent to bring the suit properties for sale by dragging the proceedings. According to the respondent, the appellants were given adequate opportunities between 2008 to 2016, but they chose to evade service of notices. The petition filed by the appellants is barred by limitation. Hence, prayed for dismissal of the petition.

6. By an order dated 04.8.2018, the learned I Additional District Judge, Thiruvallur dismissed E.A.No.48 of 2017 stating that since the main Execution Petition was dismissed in the year 2009, E.A.No.48 of 2017 is dismissed as infructuous. Challenging the said docket order, the appellants have filed the present appeal.

7. Assailing the order of the Executing Court in dismissing E.A.No.48 of 2017, the learned counsel for the appellants submitted that when the workers of the first appellant were involved in site preparation by way of cleaning bushes, the respondent's men attempted to enter upon the property and objected to the same. Only thereafter, they came to know the execution proceedings initiated by the respondent. He would submit that the petitioners were served with sale papers subsequently and within a period of 30 days from the date of knowledge, they have filed E.A.No.562 of 2016 in E.P.No.12 of 2008 to set aside the ex parte order dated 22.10.2008. However, the Executing Court, by a cryptic, non-speaking order and without assigning any reason passed the impugned order.

8. The learned counsel next submitted that in the case of the first appellant company already winding up petition was filed in the year 2003 where a provisional liquidator was appointed and the present suit filed by the respondent in the

year 2005 is barred by the provisions of Section 446 read with Section 441 of Companies Act and consequently, the decree passed therein is invalid. According to the learned counsel, the Executing Court ought to have seen that the respondent had taken notice to the appellants 2 and 3 to the address of the first appellant company only, when the appellants 2 and 3 were not in-charge of the affairs of the first appellant.

9. The learned counsel for the appellants then submitted that the Executing Court ought to have seen that the respondent is proceeding with the sale of the properties without any subsisting order of attachment and the same is in violation of Order 21, Rule 64 CPC. Further, the value of the properties stated by the respondent is very low and the properties were attached for a paltry sum of Rs.20 lakhs. Stating that taking advantage of the ex parte order dated 22.10.2008, the respondent is trying to usurp the valuable properties of the appellants and hence prayed for setting aside the order of the Executing Court. In support, the learned counsel for the appellants relied upon the decision in Indira Devi Arya v. Bajrang Lal Khaitan, reported in AIR 2001 SCW 4665 : 2000 CJ (SC) 680.

10. Per contra, the learned Senior Counsel for the respondent submitted that in order to drag on the proceedings, the appellants have filed the petition to set aside the ex parte order passed in the Execution Petition. By relying upon Three Judge Bench decision of the Hon'ble Supreme Court in the case of Nancy John Lyndon v. Prabhati Lal Chowdhury and others, reported in (1987) 4 SCC 78, the learned Senior Counsel submitted that the order of restoration of Execution Petition would certainly revive the attachment for the period during which it was in subsistence and therefore, the appellants cannot contend that the attachment has already been ceased. As far as winding up petition in relation to the first appellant's company is concerned, the learned Senior Counsel submitted that the same cannot be decided in the present proceedings.

11. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

12. The grievance of the appellants is that on 25.8.2016, when the workers of the first petitioner company were involved in the site preparation by way of cleaning, the respondent's men attempted to enter upon the property and objected to the same and on an enquiry, they came to know that the respondent had initiated execution proceedings against the appellants. Immediately, when they verified the papers from the Court, they came to know that the respondent had filed E.P.No.12 of 2008 for

attachment of the immovable properties owned by the appellants for realisation of the decree amount passed in C.S.No.196 of 2005 and in the execution proceedings in E.P.No.12 of 2008, they were set ex parte on 22.10.2008 and pursuant to the ex parte order, the properties were attached.

13. The case of the appellants is that they were not served with any notice in E.P.No.12 of 2008 and more over, E.P.No.12 of 2008 was dismissed for default on 19.6.2009 and therefore, attachment over the properties also ceases in terms of Order 21, Rule 57(2) CPC. The aforesaid contention of the petitioners cannot be accepted. It is true that on 19.6.2009, E.P.No.12 of 2008 came to be dismissed for default. However, on an application being E.A.No.29 of 2009 filed by the respondent and by an order dated 22.11.2011, E.P.No.12 of 2008 came to be restored and the Executing Court proceeded from the stage in which the Execution Petition was dismissed for default. The petitioners themselves stated in the grounds that they were served with sale papers. Therefore, the petitioners at the belated stage cannot contend that once E.P.No.12 of 2008 dismissed for default, the attachment over the properties also ceases.

14. The decision cited by the learned counsel for the appellants in Indira Devi Arya v. Bajrang Lal Khaitan, supra, the Hon'ble Supreme Court held:

"3. we find that at the time when execution case was dismissed for default, the executing Court did not pass any order extending the period of attachment. Therefore, after the restoration of the execution case, the order of attachment remained non-existent and could not have been automatically revived on the restoration of execution case. We are, therefore, of the view that in law earlier order of attachment, if not extended by the Court, stood vacated and would not revive on restoration of the execution case."

15. However, the Three Judge Bench of the Hon'ble Supreme Court in Nancy John Lyndon v. Prabhati Lal Chowdhury and others, the Hon'ble Supreme Court held:

"10. In the present case, both, the sale by the judgment debtor to Bharat Shamshere Jung Bahadur Rana and the sale by Bharat Shamshere Jung Bahadur Rana to the respondent, were effected during the subsistence of the attachment and before the title execution case was dismissed for default. In our view, even if a doubt were to be entertained as to whether an order for restoration of the suit or execution application would have the effect of

restoring the attachment retrospectively so as to affect alienations made during the period between dismissal of the suit or execution application and the order directing restoration, it is clear that an order of restoration would certainly restore or revive the attachment for the period during which it was in subsistence, namely, prior to the dismissal of the suit or execution application.

.....

13. We may mention that our attention was drawn to the amendment of Rule 57 of Order 21 made by the Calcutta High Court, but in our view that amendment merely provides that although under Rule 57 of Order 21 the attachment would cease on an order dismissing the application for execution it is open to the court to make an order to the contrary which would mean that the court could make an order to continue the attachment for some time. The amendment, however, is of no relevance in the case before us."

16. In the facts and circumstances of the case and also proceedings under which the present appeal has been filed by the appellants, the decision relied upon by the learned counsel for the appellants will not be applicable to the case on hand, as it is not the case of the appellants that subsequent to the dismissal of E.P.No.12 of 2008, alienations were made by the appellants.

17. On a perusal of the typed set of papers, it is seen that in E.P.No.12 of 2008, notice to the appellants was ordered and the same was returned as 'no such person' and therefore, the Court ordered notice by way of substituted service by way of publication in one issue of "The Hindu", Delhi Edition and the respondent had also effected paper publication and on 22.10.2008, the petitioners were called absent and set ex parte and thereafter, the Executing Court ordered attachment of the petition mentioned properties. Pursuant to the order of the Court, the properties were also attached on 07.11.2008. However, when E.P.No.12 of 2008 was pending for filing sale papers, E.P.No.12 of 2008 was dismissed for default of the respondent on 19.6.2009 and the order of Executing Court dated 19.6.2009 reads thus:

"Sale papers. No representation for the petitioner. Petitioner called absent. EP dismissed."

18. From the above, it is clear that the Executing Court while dismissing E.P.No.12 of 2008 has not raised the

attachment. Therefore, it is to be taken that the attachment made in E.P.No.12 of 2008 was subsisting when E.P.No.12 of 2008 restored on 22.11.2011. Therefore, at the belated stage during 2016, the appellants cannot contend that once the Execution Petition dismissed for default, the attachment of the properties automatically ceased. Further, the appellants cannot take advantage of the absence of specific order of the Executing Court continuing the attachment for some time. In such view of the matter, it could easily be concluded that the order of restoration of E.P.No.12 of 2008 would certainly revive the attachment.

19. As far as the ex parte order passed in E.P.No.12 of 2008 against the petitioners is concerned, since they evaded service, the Executing Court ordered notice by substituted service under Order V, Rule 20 CPC. In the case on hand, the respondent instituted the suit against the appellants for recovery of loan borrowed by them before the Calcutta High Court in C.S.No.196 of 2005, wherein also the appellants evaded service of summons sent through Court and also private notices and allowed the suit decreed ex parte on 25.1.2006. To realise the decree amount, the respondent filed E.P.No.12 of 2008 before the Principal District Court, Thiruvallur seeking to attach and sell the immovable properties belonging to the appellants. As stated supra, in E.P.No.12 of 2008, the appellants evaded service of notice, which necessitated the Executing Court to order substituted service and despite substituted service, the appellants have failed to appear before the Court, resultantly, the Executing Court set them ex parte on 22.10.2008 and ordered attachment of the properties. This Court finds no fault on the Executing Court in setting the appellants ex parte and passed an order of attachment. More over, the reason given by the appellants for setting aside the ex parte order dated 22.10.2008 is not convincing.

20. Admittedly, the order of the Executing Court in E.A.No.48 of 2017 to set aside the ex parte order dated 22.10.2008 passed in E.P.No.12 of 2008 is a non-speaking order, dismissing the said petition as infructuous. When this Court tested the reason set out by the appellants in the affidavit filed in support of E.A.No.48 of 2017 to set aside the ex parte order dated 22.10.2008 passed in E.P.No.12 of 2008, the same was found to be not convincing and intended only to drag on the execution proceedings. The appellants have stated so and filed such a petition.

21. At the out set, it is pertinent to note that the appellants have filed the present Civil Miscellaneous Appeal without filing the certified copy of the petition and orders thereon impugned in the present appeal. Though the present

appeal arises under the docket order, it is the bounden duty of the appellants to obtain certified copy of the order and then challenge the same by way of appeal and/or revision, as the case may be.

22. As far as the plea of the appellants that the institution of the suit before the Calcutta High Court by the respondent in the year 2005 itself is barred by limitation and in respect of the first appellant company, provisional liquidator was appointed are concerned, the same cannot be decided in the present proceedings. At any rate, it is admitted by both sides that the official liquidator has been discharged on 05.4.2011. Therefore, the question of serving notice on the Official Liquidator cannot and will not vitiate the proceedings initiated by the respondent and also orders passed by the Executing Court. Therefore, the non-service of notice on the Official Liquidator even if it becomes necessary, the same will not affect the order of the Executing Court impugned in the present appeal and the further proceedings.

23. It is apposite to mention that having obtained the decree in favour of them way back on 25.1.2006 in C.S.No.196 of 2005 on the file of the Calcutta High Court and also having filed Execution Petition in the year 2008 to realize the decree amount before the Court in Tamil Nadu, the respondent till date is not in a position to realize the decree amount from the appellants who are admittedly bound to pay the decree amount. Though the decree granted by the Calcutta High Court is an ex parte one, till date the same holds good and the respondent has got every right to initiate execution proceedings against the appellants pursuant to the decree passed in the suit. From the materials produced before this Court, it could be seen that only to drag on the execution proceedings and to evade payments, the appellants have filed the present Civil Miscellaneous Appeal and the same cannot be entertained.

24. In the grounds of appeal, the appellants have raised ground No.13 that the learned trial Judge ought to have seen that the value of the suit property is worth about Rs.2,00,00,000/- (Rupees Two Crores only) per acre while the properties were attached for a paltry sum of Rs.20,00,000/- (Rupees Twenty Lakhs only) per acre. Even the guideline value of the properties was Rs.87,00,000/- (Rupees Eighty Seven Lakhs only). Further, as per Order 21, Rule 64 of CPC the Execution Court can order for sale only for such portion of the property which is sufficient to satisfy the debt and not the entire property. The second part of ground No.13 clearly shows that the respondent can brought a portion of the property for sale and not the entire property. But the same is not an issue in this appeal. As far as value of the properties is concerned,

the Court Amin, after ascertaining the market value from the officials concerned, has given the value in the attachment order and if the appellants are really aggrieved by the value of the properties, they can very well state the real value of the properties at the appropriate time and not in the present proceedings.

25. For the foregoing discussion, this Court is of the view that the appellants have not made out any valid ground to interfere with the order passed in E.A.No.48 of 2017 and thus, the Civil Miscellaneous Appeal is liable to be dismissed.

26. In the result, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

The I Additional District Judge,
Tiruvallur.

+1 cc to Mr.M.V.Seshachari, Advocate Sr.No.14902

+1 cc to Mr.S.ponjeganathan, Advocate Sr.No.14870

Judgment made in
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CSL/21.02.2019

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