



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 01.11.2018
PRONOUNCED ON : 01.02.2019

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THE HONOURABLE MR. JUSTICE G.R. SWAMINATHANC.M.S.A. (MD).No.21 of 2011 and
M.P. (MD) Nos.1 and 2 of 2011

Sumathi

... Appellant/Appellant/
Petitioner/3rd Party

Vs.

1. Elango

... 1st Respondent/1st Respondent/
1st Respondent/Plaintiff

2. Parthasarathy

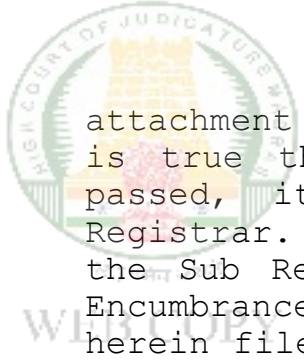
... 2nd Respondent/2nd Respondent/
2nd Respondent/Defendant

PRAYER : Civil Miscellaneous Second Appeal is filed under Section 100 of C.P.C., against the Judgment and Decree dated 27.07.2010 made in A.S.No.2 of 2009 on the file of the Additional District Court(Fast Track), Virudhunagar, confirming the Judgment and Decree dated 25.11.2008 made in E.A.No.96 of 2007 in E.P.No.31 of 2004 in O.S.No.37 of 2001 on the file of the Sub Court, Virudhunagar.

For Appellant : Mr.V.Sitharanjandas
For R-1 : Mr.P.Athimoola Pandian
For R-2 : No Appearance

J U D G M E N T

The first respondent herein, namely, Elango filed O.S. No.37 of 2001 on the file of the Sub Court, Virudhunagar, seeking to recover a sum of Rs.1,10,866.50/- from the second respondent herein. The suit was eventually decreed and to execute the same, E.P.No.31 of 2004 was also filed. The first respondent had obtained an order attaching the suit property under Order 38 Rule 5 of C.P.C. The order of attachment before Judgment was made on 27.04.2001. While so, the second respondent along with his brother sold the attached property to the appellant herein on 26.06.2003. After succeeding in the suit against the second respondent, the first respondent filed O.S.No.166 of 2003 against the appellant herein for restraining the appellant from putting up any construction in the property in question. The said suit was dismissed on 24.10.2005. What is significant is that it was a contested suit and the first respondent who is the plaintiff in O.S.No.166 of 2003 marked Ex.A.3 Encumbrance Certificate dated 09.07.2003. While dismissing the suit, the learned trial Munsif observed in paragraph No.13 of the Judgment that the



attachment before Judgment was not reflected in the said Ex.A.3. It is true that after the order of attachment before Judgment was passed, it was duly communicated to the office of the Sub Registrar. But then, due to omission on the part of the office of the Sub Registrar concerned, attachment was not reflected in the Encumbrance Certificate. Armed with this evidence, the appellant herein filed E.A.No.96 of 2007 under Order 21 Rule 58 of C.P.C. for raising attachment. The said E.A. was dismissed by the executing Court. Questioning the same, the appellant filed an appeal in A.S.No.2 of 2009 before the Additional District Court, Virudhunagar. The first appeal filed by the appellant met the same fate. Challenging the same, this Civil Miscellaneous Second appeal has been filed.

2. This Court admitted the Civil Miscellaneous Second appeal on the following substantial questions of law:-

"1. Whether the Courts below have erred in dismissing the claim of the appellant without ascertaining as to whether the order of attachment was duly communicated to the office of the Sub Registrar within whose jurisdiction the property situated and entered in the register maintained in the office of the Sub Registrar?

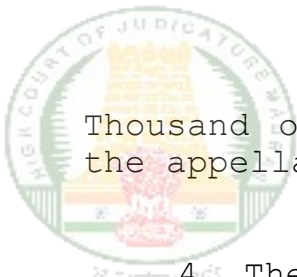
2. Whether the Courts below have failed to consider that the decree made in O.S.No.166 of 2003 on the file of the District Munsif Court, Virudhunagar, become final and binding on the parties to the suit?

3. Whether the Courts below have erred in not considering the evidence of the first respondent/decreed holder recorded in the connected suit between the same parties?

4. Whether the Courts below have erred in not treating the appellant as the *bonafide* purchaser of the suit property in dispute as the order of attachment was not reflected in the encumbrance register maintained in the office of the Sub Registrar?

5. Whether the Courts below have failed to shift the burden upon the first respondent to prove the collusive nature and want of *bonafide* in the transaction between the appellant and Judgment debtor."

3. When the matter was taken up for final hearing, the learned counsel appearing for the appellant stated that when the interim order was granted in the Civil Miscellaneous Second appeal, the appellant was directed to make a deposit of a sum of Rs.91,177/- and that the said amount has been deposited to the credit of E.P.No.31 of 2004 in O.S.No.37 of 2001 on the file of the Sub Court, Virudhunagar and that it is probably earning interest. He stated that the appellant will not have any objection for the decreed holder to withdraw the said amount deposited by her with whatever interest that has accrued. He also submitted on instructions that the appellant would further pay a sum of Rs.60,000/- (Rupees Sixty



Thousand only) to the first respondent. This undertaking given by the appellant through her counsel is placed on record.

4. The learned counsel appearing for the appellant pointed out that before the executing Court, the Judgment dated 24.10.2005 in O.S.No.166 of 2003 on the file of the District Munsif Court, Virudhunagar was marked as Ex.A.2. It has already been noted that a categorical finding has been given in the said Judgment that the attachment before Judgment was not reflected in the Encumbrance Certificate and that the appellant was not aware of the same. This finding was given in the suit which was instituted by the first respondent against the appellant herein. Since it is a finding rendered between the parties, it would operate as a *res judicata*. Thus, it is no longer be a matter of controversy as to whether the order of attachment before Judgment obtained by the first respondent against the second respondent in respect of the suit property was ever shown in the Encumbrance Certificate or not.

5. Now the only question is application of the legal principle. The learned counsel appearing for the appellant submitted that the issue is no longer *res integra*. In the decision reported in (2000) II C.T.C. 524(Sri Krishna Chit Funds (Sattur Pvt. Ltd.,) V. R.S.Pillai), it was held that the subsequent purchaser without knowledge of the attachment before Judgment which was not disclosed in the Encumbrance Certificate, is a *bona fide* purchaser for value. Admittedly, the attachment was not reflected in the Encumbrance Certificate. The subsequent purchaser did not know the attachment. Therefore, the appellant herein will have to be considered as only a *bona fide* purchaser for value. Since this aspect of the matter was omitted to be taken only by the Courts below, substantial questions of law Nos.2 and 4 are answered in favour of the appellant. The orders passed by the Courts below are set aside.

6. The Civil Miscellaneous Second appeal stands allowed, accordingly. As already undertaken, the appellant shall pay a sum of Rs.60,000/- to the credit of of E.P.No.31 of 2004 in O.S.No.37 of 2001 on the file of the Sub Court, Virudhunagar within a period of eight weeks from the date of receipt of a copy of this order. On such deposit, the first respondent is entitled to withdraw the amount. The first respondent can also withdraw the already deposited amount together with interest. No costs. Consequently, connected Miscellaneous petitions are closed.

Sd/-

Assistant Registrar

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1. The Additional District Judge(Fast Track),
Virudhunagar.

2. The Subordinate Judge,
Virudhunagar.

3. The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1cc to Mr. V.Sitharanjandas, Advocate, SR.No. 44653

+1cc to Mr.P.Athimoola Pandian, Advocate, SR.No.44650

C.M.S.A.(MD).No.21 of 2011 and
M.P.(MD)Nos.1 and 2 of 2011
01.02.2019

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