



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.11.2020

Pronounced on: 24.11.2020

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Coram:

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

S.A.No.858 of 2010
& M.P.No.1 of 2010

1. Saradhammal,
2. Santhammal,
3. Vinayagam,
4. Minor Navaneethamal,
5. Minor Selvaraj, ... Appellants/Respondents/Plaintiffs
Minors represented by their mother and
natural guardian the 1st appellant.

/versus/

Sankaralingam ... Respondent/Appellant/Defendant

Prayer: Second Appeal is filed under Section 100 of C.P.C., praying against the judgment and decree of the Court of the Sub Judge, Vellore in A.S.No.84 of 1994 dated 26.02.1997 in reversing the well considered judgment and decree in O.S.No.191 of 1982 and dated 31.03.1994 on the file of the District Munsif Court, Gudiyatham.

For Appellants : Mr.V.Raghavachari
For Respondent : Mr.Suganthan,
for Mr.N.Manokaran

J U D G M E N T

(The case has been heard through video conference)

The appellants herein are the plaintiffs in the suit filed for declaration and injunction in respect of the property purported to have been purchased by one Arumugam bonafidely and for due consideration from Subramani and Krishnan under the sale deed dated 30.10.1973. The vendors of Arumugam got the property from one Syed Usuf Sahib vide sale deed dated 15.05.1968. Arumugam took the possession of the property and made improvement over it. He died a year before the suit. After his demise, the property devolved upon the appellants being his legal heirs. Alleging that the respondent herein attempted to trespass into the suit property on 12.11.1981 claiming title, the suit filed for the relief of declaration of title and injunction.



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2. The respondent herein contested the suit stating that one Syed Yusuf Sahib, who was the original owner of the property borrowed Rs.1,300/- from one Duraisamy Mudaliar. To recover the said money Duraisamy Mudaliar filed O.S.No.24/1968 on the file of District Munsif Court at Thirupattur. There was an order of attachment before judgment in respect of the suit property pending suit. The suit reached its finality when the Second Appeal filed by the judgment debtor/ Syed Yusuf Sahib dismissed on 30.04.1975 by the High Court. Thereafter, the suit property was brought for auction sale by the decree holder. The respondent herein purchased the suit property for Rs.2,510/- in the Court auction dated 10.06.1981, held pursuant to the execution petition. The auction sale was confirmed and sale certificate was issued to him on 15.09.1981. Thereafter, he took possession of the property through Court on 10.11.1981. Being the Court auction purchaser and had validly taken delivery of the property through Court, the suit for declaration of title is not maintainable since the transaction of the property under attachment pending litigation is void.

3. The Trial Court held that the defendant failed to prove the fact that the suit property was under court attachment on the 15.05.1968 when Syed Yusuf sold the property to Subramani and Krishnan. The plaintiff's predecessor-in-title Arumugam, who purchased the property on 30.10.1973 had taken possession of the property and revenue records are mutated in his name. He had improved the land by getting electricity connection and installing motor pumpset. After his demise, the plaintiffs are in possession of the property. Therefore, the sale deed dated 30.10.1973 is valid and the title over the property had duly passed to the predecessor of the plaintiffs. Regarding possession, taking note of the documents such as Chitta, Adangal, Patta, demand notice from Electricity Board, Consumption Bills supporting the possession and enjoyment by the plaintiffs, the Trial Court held that the delivery of possession through Court as recorded in Ex.B.1 is only a paper delivery.

4. Aggrieved by that the defendant preferred First Appeal. Before the First Appellate Court, the suit register extract of O.S.No.24 of 1968 was admitted into evidence as additional document Ex.B-6. The First Appellate Court, after considering the sequence of events, arrived at the conclusion that, in the money suit O.S.No.24/1968 filed by Doraisamy Mudaliar against Syed Yusuf Sahib ABJ was ordered in respect of the suit property. The suit was first decreed ex parte on 31.05.1968. Later, at the instance of the defendant, the exparte decree was set aside. After full trial, the suit was allowed and decree passed on 28.06.1969. The vendors of Arumugam had purchased the property from Syed Yusuf Sahib on 15.05.1968 under Ex.B-4. In this sale deed, the recital refers about the attachment before judgment obtained by Duraisamy Mudaliar. Out of total sale



consideration of Rs.1300/-, the purchasers Subramani and Krishnan had withheld a sum of Rs.1,000/- in view of Attachment of the property. With knowledge about the pendency of suit and attachment before judgment, the property was purchased by the vendors of Arumugam. Neither Syed Yusuf nor Subramani and Krishnan, who purchased the property had satisfied the decree amount to raise the attachment. Arumugam had purchased the property on 30.10.1973 had improved the property and enjoying it till his life time. After his demise, his legal heirs who are the plaintiffs are in possession of it. Nevertheless, the sales pending lite when attachment before judgment was in force is void. The vendors of Arumugam, had no valid title to alienate. Therefore, Arumugam and his legal heirs can have no better right to seek for declaration of title based on the sale deed Ex.A-1. However, the possession with the plaintiffs being proved through overwhelming evidence contrary to the defendant claim regarding possession based of Ex.B-1, delivery of possession recorded by Amin, the First Appellate Court held it to be only a paper delivery and allowed the appeal with liberty to the appellant/defendant to seek delivery of possession by initiating separate proceedings.

5. Against the said reversing judgment, the present second appeal is filed.

6. On considering the submissions made by the Learned counsels and perusing the records, the following substantial questions of law were formulated for decision:-

"1. Whether the Lower Appellate Court ought not to have held that the respondent had failed to prove the order of attachment and also actual attachment of the property as per the C.P.C?

2. Whether the Lower Appellate Court is right in allowing the application for additional evidence at the appellate stage, when the provisions of Order 41 Rule 27 of C.P.C had not been complied?

3. Whether the Lower Appellate Court is right in nullifying the sale of the year 1968 Ex.B4 and in upholding a Court auction sale alleged to have been conducted on 16,6,81 and should it not have held that on the date of auction the judgment debtor (Yusuf) had no title to the property and consequently the Court auction purchaser could not have any right over the property?"

7. The Learned Senior Counsel appearing for the appellants after drawing the attention of this Court to Order 21 Rule 54



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C.P.C and Order 38 Rule 7 of C.P.C, contended that, the defendants primarily failed to prove that when the suit property sold by Yusuf under Ex.B-4 sale deed dated 15.05.1968, the property was subjected to attachment before judgment. There is no evidence placed by the respondent/defendant that the attachment was duly proclaimed as per Order 21 Rule 54(2) of C.P.C. The First Appellate Court ought not to have presumed that there would have been an order of attachment before judgment. On the date of auction sale (18/06/1981), Yusuf ceased to be the owner of the property and he having lost his right vide Ex.B-4, the purchaser of the Court auction sale will not have any right in the property. The First Appellate Court having held that Ex.B-1 is only a paper delivery, it ought not to have declined to grant the declaration of title. The First Appellate Court failed to follow the dictum of the Courts which had consistently held that if the proclamation in the locality, Court house, etc., had not been made, the order of ABJ will become ineffective.

8. In support of his submission, he relied upon the judgment reported in Sinnappan vs. Arunachalam Pillai reported in AIR 1920 Mad 804 and Sarammal Vs. S.Dilshad Begum and others reported in 2004 (2) MLJ 411.

9. The Learned Counsel representing the respondent countered the submission by pointing out the recital in Ex.B-4, which in unambiguous term had disclosed about the attachment before judgment in respect of the suit property. The purchasers Subramani and Krishnan knowing well about the attachment had entered into the transaction. When the admission in the recital of the sale deed proves the factum of ABJ at the time of Ex.B-4, no further proof required beyond the admission. As per Section 64 of C.P.C, any private alienation of a property after attachment is void. Order 38 Rule 10 of C.P.C only protect the right of strangers not party to the suit, or any right existing prior to attachment or the right of a person having a decree against the defendant from applying for the sale of the property under attachment in execution of such decree. In this case, the appellants are not strangers. The First appellant is sister of the vendors. Her vendors purchased the property from the judgement debtor after well aware of the ABJ order. Order 21 Rule 54 (3), the Madras High Court amendment clearly declares that the order of attachment shall be deemed to have been made against any persons from the date on which they had knowledge of the order of the attachment.

10. Relying upon the observation of the Hon'ble Supreme Court in S.Noordeen -vs- S.Vekita Reddiar and others reported in 1996 SCC (3) 289, the Learned Counsel for the respondent submitted that, the attachment before the judgment is an encumbrance preventing the owner of the property to create sale or create charge thereon. It disables the defendant from



creating any encumbrance. Despite the prohibition in view of the order of Attachment, the defendant Yusuf Saheb created sale deed to Subramani and Krishnan under Ex.B.4, getting Rs.300/- and leaving the balance Rs.1,000/- to be retained to clear the attachment. His purchasers, in turn had sold it to their brother-in-law. Both these transactions are void transactions created during the attachment pending suit and appeals. Hence, submitted that the substantial questions of law has to be answered against the appellants.

11. When the Court at any stage of a suit is satisfied by affidavit or otherwise, that the defendant with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property may order of attachment before judgment under Order 38 Rule 5 of C.P.C. The spirit behind this provision is very obvious. Precisely for the same reason, Section 64 of C.P.C says, any private alienation after attachment is void. The plain object of these provisions is to prevent the successful perpetration of fraud by the debtor against the just claims of the creditor. Section 64 of C.P.C strictly restricts the right of alienation of the property.

12. In this case, the fulcrum of the appellants argument is that the date of attachment is not established by the defendant/respondent. The admission of Ex.B.6 at the appellate stage to ascertain the fact of ABJ is violation of Order 41 Rule 27 of CPC.

13. The evidence before the Court clearly establishes the fact that when Ex.B.4 was executed by Syed Yusuf Sahib on 15.05.1968 the money suit O.S.No.24/1968 was pending against him. The said suit was partly allowed on 28.06.1968. Against the disallowed portion, Duraisamy had preferred First Appeal in A.S.No.184/1969 and the same was allowed. Against the First Appeal judgment and decree, Yusuf Sahib preferred Second appeal in S.A.No.504/1972 and it was dismissed on 30.04.1975. Meanwhile, Subramani and Krishnan, the purchasers under Ex.B-4 had sold the property to Arumugam under Ex.A-1 dated 30.10.1973. In the sale deed Ex.B.4, the attachment before judgment in respect of the suit property ordered by the Court in the pending suit initiated by Duraisamy Mudaliar has been mentioned. There is no evidence to show except O.S.No.24 of 1968 there were any other suit pending between the parties at that relevant point of time. Therefore, when Ex.B.4 came into existence admittedly both the vendor as well as the purchasers were conscious of the fact that the subject property is under attachment by virtue of the Civil Court order. Admission is best form of proof. No proof required to fix the date of attachment, when the admission of the parties in clear terms proves the subsistence of the attachment before judgment.



14. The purpose of Order 21 Rule 54 (2) of C.P.C which contemplates proclamation of attachment at prominent places like Court House and Village Office including beat of drum or other customary mode is to make public the attachment and put them alert about the court's restriction.

15. The provision of proclamation of the order of attachment has been made in sub-rule (2) of Rule 54 of Order 21 of C.P.C is with the object to prevent the judgment debtor from transferring or charging the property in anyway and all other persons taking any benefit thereunder. This provision is for the innocent buyers benefit to prevent them from falling prey to any debtor alienating his encumbered property to gullible buyer suppressing the fact of attachment. This provision cannot be taken advantage by parties whose knowledge of ABJ expressly stated in the deed. It is obvious from Ex.B.4, the buyer had wagered on the promise of his vendor who was pursuing the money suit. Therefore, neither Subramani and Krishnan nor any other person through him can claim that for want of proclamation the order of attachment is unenforceable.

16. Order 38 Rule 5 of C.P.C provides to prevent the Act of deceit by alienating the property pending suit. Section 64 of C.P.C declares any private alienation when attachment in force as a void transaction. Section 52 of Transfer of property Act, prohibits transfer of property affecting the right or interest of the other parties pending suit. If one read section 64 of C.P.C and Section 52 of the Transfer of Property Act, along with Order 38 of C.P.C will invariable come to the conclusion that, in the instant case, the transfer of an immovable property under attachment with knowledge about the attachment has to fall.

17. Reverting back to the respondent contention, pursuant to the execution petition in O.S.No.24 of 1968 he purchased the suit property for Rs.2,510/- in the Court auction held on dated 10.06.1981. Ex.B.3 dated 15.09.1981 is the sale certificate. The delivery warrant dated 07.11.1981 is marked as Ex.B.2. Thereafter, he took possession of the property through Court on 10.11.1981 vide Ex.B.1. Being the Court auction purchaser the title or his right to get possession of the auction purchased property cannot be deprived. The attachment before judgment and Court Auction sale are judicial Acts and are to be presumed to have been performed regularly under Section 114 (e) of the Evidence Act. In the absence of contra evidence in the nature of rebuttal, the respondent's right conferred by the Act of the court cannot be taken away by the violator of the Court order or his representatives.

18. In the result, the substantial questions of law are answered as under:

a). The difference between the order of attachment and actual attachment shall arise only when the parties to the



contract not aware of the attachment. When admittedly parties to the contract had sold the property subject to the attachment, no further proof required to hold the existence of attachment order on the date of Ex.B.4.

b). The Trial Court has admitted Ex-B.6 as additional document after hearing both sides. It has given cogent reason for admitting it in evidence. Ex.B.6 is the suit register extract of the previous proceedings in respect of the suit property. Being a record of the Court, even without marking it, the Court is empowered to call for the Court records and take judicial notice of the content. There is no procedural error or illegality found in marking the additional document in the appeal exercising the power under Order 41 Rule 27 of C.P.C.

c). There is specific prohibition in Order 21 Rule 54 of C.P.C to create charge or alienation of the property under attachment. Therefore, the First Appellate Court is right in holding the transfer of attached property by private sale through Ex.B.4 followed by Ex.A.1 as nullity. The sale in the Court auction on 16.06.1981 is consequence to the execution of decree passed in O.S.No.24 of 1968 dated 28.06.1969. The property was under attachment through out. The suit culminated on confirmation of the decree by the High Court in S.A.No.504/1972 dated 30.04.1975. Thereafter, the execution petition E.P.No.127 of 1981 is filed to bring the attached property for sale. In the said legal and factual circumstances, the divesting of attached property by Yusuf to obstruct and delay the execution of decree is void. For all purpose, in the eye of law the title stays with Yusuf.

19. As a result, the judgment and decree of the First Appellate Court is confirmed. Hence, the Second Appeal is dismissed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

bsm

To:-

1. The Sub Judge, Vellore
 2. The District Munsif Court, Gudiyatham.
 3. The Section Officer, V.R.Section, High Court, Madras.
- +1cc to M/s.N.Manokaran, Advocate SR.No. 37921
+1cc to M/s.V.Raghavachari, Advocate SR.No. 37689

S.A.No.858 of 2010
& M.P.No.1 of 2010

CNR (CO)

B.VC(13.08.2021)