



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.11.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A.No.4 of 2012

M.Palanisamy ... Appellant/Appellant/Petitioner

-vs-

1. M.Kumarasamy  
2. M.Thangavel  
3. M.Duraisamy ... Respondents/Respondents/Respondents

Memorandum of Grounds of Civil Miscellaneous Second Appeal filed under Order XXI, Rule 98 read with Section 100 of the Code of Civil Procedure, against the judgment and decree dated 12.10.2011 made in A.S.No.17 of 2011 on the file of the Principal District Judge, Erode, against the order dated 30.11.2010 made in E.A.No.8 of 2007 in E.P.No.125 of 2006 in O.S.No.276 of 2003 on the file of Subordinate Judge, Gobichettipalayam.

For Appellant :: Mr.R.T.Doraisamy

For Respondents:: Mr.A.V.Arun for R1 & R2  
No appearance for R3

JUDGMENT

The decree holder in O.S.No.276 of 2003 has come to this Court with the civil miscellaneous second appeal, challenging the impugned judgment and decree passed by the learned Principal District Judge, Erode in A.S.No.17 of 2011 dated 12.10.2011, allowing the appeal, setting aside the fair and final order dated 30.11.2010 passed by the learned Subordinate Judge, Gobichettipalayam in E.A.No.8 of 2007 in E.P.No.125 of 2006 in O.S.No.276 of 2003, raising the following substantial questions of law:-

“(i) Whether the lower appellate Court was correct in holding that the sale deed dated 31.05.2004 made in favour of the purchasers, the respondents 1 & 2 herein for value is valid, which was held after the attachment order dated 16.12.2003 was passed, under Section 64 of the Code of Civil Procedure?



WEB COPY

(ii) Whether the lower appellate Court has not committed material irregularity in holding that the purchasers, the respondents 1 & 2 herein had no knowledge about the order of attachment even after receiving notice under Ex.B2 dated 18.5.2004?

(iii) Whether the transfer under the sale deed dated 31.05.2004 in favour of the purchasers, the respondents 1 & 2 herein is not affected by the principle of lis pendens?"

2. Learned counsel appearing for the appellant/decreed holder pleaded that the appellant filed the suit on promissory note against the third respondent-M.Duraisamy and obtained an order of attachment before judgment dated 16.12.2003 in I.A.No.540 of 2003 in O.S.No.276 of 2003. Even the factum of the order of attachment before judgment was informed by the third respondent to the purchasers, the respondents 1 & 2 herein in person on 16.5.2004. In spite of the same, when the respondents 1 & 2 tried to venture into the sale, the third respondent/judgment debtor sent registered notices on 18.5.2004 stating the facts of the order of attachment dated 16.12.2003, which were received by the respondents 1 & 2 on 21.5.2004 and 1.6.2004 respectively, therefore, they cannot be considered as bona fide purchasers. When the respondents 1 & 2 themselves ventured in getting the sale deed registered in their favour, when the order of attachment before judgment dated 16.12.2003 was in force passed in I.A.No.540 of 2003 in O.S.No.276 of 2003 in favour of the appellant/decreed holder, they cannot plead that they had no knowledge of the order of attachment for sale, which is hit by the principle of lis pendens. As this aspect has been completely overlooked by the lower appellate Court, this civil miscellaneous second appeal deserves to be allowed. When the purchasers had full knowledge about the order of attachment dated 16.12.2003 attaching the suit property in I.A.No.540 of 2003 in O.S.No.276 of 2003 on 16.12.2003, the sale that took place on 31.5.2004, in spite of the receipt of legal notice under Ex.B2 dated 18.5.2004, the lower appellate Court ought to have held that the respondents 1 & 2 are not the bona fide purchasers, for the simple reason that Section 64 of the Code of Civil Procedure does not allow any alienation of the suit property after the order of attachment was passed, therefore, the impugned judgment and decree are liable to be set aside.

3. Mr.A.V.Arun, learned counsel appearing for the respondents 1 & 2 argued that the respondents 1 & 2 are bona fide purchasers for a valuable consideration, because they had purchased the property for a sum of Rs.12,00,000/- on 31.5.2004



and from the date of purchase, they have been in possession and enjoyment of the same without any interference from anyone by paying tax etc. Adding further, he has argued that when the respondents 1 & 2 purchased the property, there were four Court attachments. therefore, they had discharged all the debts pertaining to the Court attachments and endorsements were also made in the sale deed. Even before the purchase, they have made elaborate enquiries in the Sub Registrar's office of Nambiyur village , wherein it was found that no entries regarding the encumbrance was noted down in the encumbrance certificate. Moreover, the order of attachment was not even served on the Sub Registrar, on the date of purchase of the property. On seeing the encumbrance certificate that the respondents 1 & 2 have discharged all the debts pertaining to the Court attachments and thereupon endorsements were also made in the sale deed, the lower appellate Court held that the respondents 1 & 2 are bona fide purchasers. Adding further, he has stated that except the above mentioned Court attachments, there were no other attachments. Even if they had come to know about any other attachment, they would have discharged the debt pertaining to that also. This apart, the appellant is having more properties other than the suit mentioned property. While that being so, on 12.1.2007, they learnt that the suit property was going to be brought for Court auction, therefore, they filed the petition for raising the attachment. The Sub Registrar of Nambiyur was also examined as P.W.2, who has categorically admitted that the order of attachment was served on 22.6.2004. That clearly shows that there was no endorsement in the encumbrance certificate, therefore, the respondents 1 & 2 proceeded to purchase the property. In view thereof, the respondents 1 & 2 are to be considered as bona fide purchasers. In support of his submissions, he has relied on a judgment of this Court in Sri Humbi Hema Gooda etc., etc., v. Tamil Nadu State Transport Corporation (CBE) Limited and others, 2012 (1) CTC 407 for the proposition that communication of the order of attachment to the registering officer is mandatory. Hence, if the mandatory provision has not been followed, as per Rule 11-B of Order 38 of the Code of Civil Procedure, the order of attachment cannot be sustained. Based on the said ratio, Mr.Arun stated that when the Sub Registrar of Nambiyur, who was examined as P.W.2, clearly stated that the order of attachment before judgment was served only on 22.6.2004, that shows that there was no endorsement in the encumbrance certificate on the date of purchase of the property by the respondents 1 & 2 on 31.5.2004.

4. Having heard learned counsel for the parties, it has to to examined whether the order of attachment before judgment passed on 16.12.2003 in I.A.No.540 of 2003 in O.S.No.276 of 2003 was brought to the notice of the purchasers, the respondents 1 & 2 herein, so as to face the consequences of Order 38, Rule 11-B



of the Code of Civil Procedure. Admittedly, in the present case, the appellant, having filed the suit in O.S.No.276 of 2003 for recovery of money based on the promissory note, got an order of attachment before judgment in I.A.No.540 of 2003 on 16.12.2003 in respect of the suit property. When the order of attachment before judgment was passed on 16.12.2003, the judgment debtor-M.Duraisamy informed the respondents 1 & 2 in person on 16.5.2004. Even registered notices were also sent on 18.5.2004 and the same were received by the respondents 1 & 2 on 21.5.2004 & 1.6.2004 respectively, therefore, when the purchasers were informed by registered notices on 18.5.2004 and the same was received by the first respondent on 21.5.2004, their act of proceeding further to get the sale deed executed on 31.5.2004 is clearly hit by the principle of lis pendens. Moreover, Section 64 of the Code of Civil Procedure also clearly makes any such alienation as void. In this context, it is relevant to extract Section 64 of the Code of Civil Procedure as follows:-

"S.64. Private alienation of property after attachment to be void.- (1) Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.

Explanation-For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

5. A reading of the above provision clearly shows that private alienation of property after attachment to be void. Since in the present case the order of attachment before judgment was passed on 16.12.2003 in I.A.No.540 of 2003 in O.S.No.276 of 2003 and the registered notices informing the order of attachment were sent on 18.5.2004 to the respondents 1 & 2, which was received by the first respondent on 21.5.2004, after receipt of the notice, they cannot plead that had they known about the order of attachment before judgment, they would not have purchased the property in the sale, that is clearly hit by Section 64 of the Code of Civil Procedure.



6. Coming to the principles enunciated in Order 38, Rule 11-B of the Code of Civil Procedure that the communication of the order of attachment to the concerned registering authority is mandatory and in the absence of communication, the order of attachment has no force, it has been specifically pleaded in the present case that when the purchasers were directly informed by the registered notices dated 18.5.2004 about the passing of the order of attachment before judgment and such notice was also received by the first respondent on 21.5.2004, the onus is on the purchasers to enquire whether the order of attachment before judgment dated 16.12.2003 passed in I.A.No.540 of 2003 in O.S.No.276 of 2003 was in force, which they have not done, therefore, they cannot be considered as bona fide purchasers. This crucial aspect has been completely overlooked by the lower appellate Court, hence, the impugned judgment and decree are liable to go and the first substantial question of law is answered in favour of the appellant.

7. Coming to the second substantial question of law, when it has been the case of the appellant before the Courts below that the purchasers were informed by registered notices on 18.5.2004 and such notice was also received by the first respondent on 21.5.2004, the plea made by the purchasers, the respondents 1 & 2 that the Sub Registrar of Nambiyur, P.W.2 has categorically admitted that the order of attachment was served only on 22.6.2004, is unjustified, for the reason that they have not denied the receipt of notice. Secondly, in the legal notices, the particulars of the order of attachment before judgment dated 16.12.2003 passed in I.A.No.540 of 2003 in O.S.No.276 of 2003 and the pendency of the suit also have been clearly mentioned, therefore, it is the bounden duty of the purchasers to make themselves clear and should have held elaborate enquiries before purchasing the property. Hence, they cannot be considered as bona fide purchasers. This aspect also has been completely overlooked by the lower appellate Court. Therefore, finding material irregularity committed by the lower appellate Court, the impugned judgment and decree are liable to go and the second substantial question of law is also answered in favour of the appellant.

8. Coming to the third substantial question of law, as highlighted above, when the appellant had filed the suit in O.S.No.276 of 2003 on the basis of the promissory note and also obtained an order of attachment before judgment on 16.12.2003 in I.A.No.540 of 2003, the sale or transfer of the suit property that took place on 31.5.2004 is not only directly hit by Section 64 of the Code of Civil Procedure, but also by the principle of lis pendens under Section 52 & 53 of the Transfer of Property



Act. Moreover, in the present case, when the registered notices dated 18.5.2004 were sent to the purchasers and such notice was also received by the first respondent on 21.5.2004, the respondents 1 & 2 cannot take shelter on the principles enunciated under Order 38, Rule 11-B of the Code of Civil Procedure, when they were already put on notice and were aware of the factum of the order of attachment before judgment dated 16.12.2003 passed in I.A.No.540 of 2003 in O.S.No.276 of 2003 by the learned Subordinate Judge, Gobichettipalayam. In spite of receipt of the notices, they have proceeded to take a risk by way of alienating the property. Therefore, the third substantial question of law is also answered in favour of the appellant.

9. For all the aforementioned reasons, answering the substantial questions of law in favour of the appellant, considering the fact that the respondents 1 & 2 have not come to the Court with clean hands, the impugned judgment and decree passed by the lower appellate Court are set aside and the civil miscellaneous second appeal stands allowed with costs of Rs.10,000/- (Rupees ten thousand only) payable by the respondents 1 & 2 to the appellant, within a period of four weeks from the date of receipt of a copy of this order. Consequently, M.P.No.1 of 2012 is closed.

Sd/-  
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ss  
To

1. The Principal District Judge,  
Erode.

2. The Subordinate Judge,  
Gobichettipalayam.

+1cc to M/s.A.V.Arun, Advocate Sr.38376

C.M.S.A.No.4 of 2012

rr[co]  
srg 12/11/2021