

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.08.2020

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

**C.R.P (NPD).No.3061 of 2011
and M.P.No.1 of 2011**

S.Thiruvengadam

... Petitioner/Plaintiff

Vs

1.G.Srinivasan
2.Chidambaram
3.R.Doss

... Respondents/Defendants

Prayer: Civil Revision Petition filed under Section 115 C.P.C. to set aside the order dated 20.11.2009 made in E.P.No.10 of 2006 in O.S.No.60 of 2003 on the file of the learned District Munsif-cum-Judicial Magistrate, Thirukalukundram by allowing the Civil Revision Petition.

For Petitioner : Mr. R.Marudhachalamurthy

For R1 : Given up

For R2 & R3 : Notice (Service awaited)

ORDER

The petitioner herein has filed an Execution Petition in E.P.No.10 of 2006 in O.S.No.60 of 2003 on the file of the lerned District Munsif-cum-Judicial Magistrate, Thirukalukundram.

2. The petitioner herein has filed a suit against the respondent in O.S.No.60 of 2003 on the file of the District Munsif-cum-Judicial Magistrate, Thirukalukundram, for recovery of money. The suit was decreed against the first respondent dated 22.07.2005. Thereafter, the petitioner filed an Execution Petition in E.P.No.10 of 2006 and in the said petition, the respondents 2 and 3 have filed a common counter affidavit. After enquiry, that petition was dismissed by order dated 20.11.2009. Challenging the said dismissal of the Execution Petition, the petitioner has come before this Court by way of filing this revision.

3. The learned counsel for the petitioner would submit that the petitioner filed the suit against the respondents and in the said suit, the first respondent remained *exparte* and subsequently, after the trial, the suit was decreed on 22.07.2005. After filing of the suit, the petitioner has also filed an application for attachment of the property before judgment. Subsequently, after the decree, the petitioner has filed an Execution Petition in E.P.No.10 of 2006 to bring the attached property for sale and to release the decree amount out of the sale proceeds of the said property. In the said petition, the respondents 2 and 3 have filed a common counter and the first respondent did not file any counter and not appear before the Court. While so, the Execution Court has wrongly dismissed the Execution Petition stating that the attached

property is not belonging to the first respondent and neither the first respondent nor his wife has come to the Court, to prove that the property is not the property of the first respondent. The respondents colluded with each other and in order to defeat the claim of the petitioner, they created a document to show as if the property belongs to the wife of the first respondent and sold the property to the second and third respondents and the sale receipt also stated to have been issued by the first respondent in favour of the second and third respondents. The learned counsel for the petitioner further submitted that neither the first respondent nor the second and third respondents filed any petition to raise the attachment before judgment during the pendency of the suit and after attachment, if any sale is made the same is not valid before the Execution Court. The Execution Court has failed to consider the said fact and dismissed the Execution Petition and also the attachment made by the trial Court was raised which is against the law.

4. The learned counsel for the respondent would submit that the property originally belongs to the wife of the first respondent Lakshmi Ammal. The property was assigned to Lakshmi Ammal alone and thereafter she sold the property to the second and third respondents and therefore the wife of the first respondent also issued the receipt for

sale consideration. However, she could not execute the sale deed and therefore, she executed the power of attorney to the second the third respondents. Therefore, the property is not belonging to the first respondent. No decree was passed against the second and third respondents and though the suit was decreed as exparte as against the first respondent, since the property is not belonging to the first respondent, the attachment itself is not valid. Even in the Execution Petition, it is not proved that the attached property belongs to the first respondent/judgment debtor and no decree as against the second and third respondents, therefore the property cannot be sold before the Execution Court which has rightly dismissed the Execution Petition and raised the attachment. Therefore, the learned counsel for the respondent seeks to dismiss the revision.

5. Heard. Perused the records.

6. Admittedly, the petitioner filed a suit against the respondents in O.S.No.60 of 2003 on the file of the District Munsif-cum-Judicial Magistrate, Thirukalikundram and the said suit was decreed on 22.07.2005 and on a reading of the judgment and decree of the Trial Court, it is seen that the first respondent was directed to pay a sum of Rs.16,350 with interest @ 12% p.a. from the date of the suit, till the

date of the decree and after the decree to pay interest @ 6% p.a till the realisation of the amount Rs.15,000/- from the date of the decree till the date of the realisation and admittedly, there is no decree as against the second and third respondents.

7. Further, it is seen from the records that the suit property was attached before the judgment during the pendency of the suit. So after the judgment and decree dated 22.07.2005, the petitioner filed Execution Petition in E.P.No.10 of 2006 and sought a direction to the Execution Court to sell the property, which is already attached in I.A.No.291 of 2003 in O.S.No.60 of 2003.

8. The argument of the learned counsel for the petitioner is that the property belongs to the first respondent and at the time of the suit, the petitioner also filed an application to attach the said property before the judgment in I.A.No.291 of 2003 in O.S.No.60 of 2003. In the said application, the petition mentioned property was attached; even during the pendency of the suit, neither respondents 2 and 3 nor the wife of the first respondent filed any application to raise the attachment and after the attachment of the property before the judgment, the first respondents created documents against the interest of the petitioner and now they have objected for the attachment and sale of the

property. The Execution Court has also failed to consider the fact that neither the first respondent nor the wife of the first respondent has filed a petition to raise the attachment of the property. It is further contention of the petitioner that when the property is not belonging to the first respondent and it belongs to the wife of the first respondent and the same was sold to the second and third respondents, since they are parties to the suit, soon after passing of the attachment order they should have filed petition to raise attachment therefore the order passed by the Execution Court is unsustainable. It is further contended that the respondents have not filed any document to show that the property belongs to the wife of the first respondent, as such, the order passed by the Trial Court is liable to be set aside.

9. A careful perusal of the judgment and decree and the order passed in the Execution Petition and Ex.R1 show that the property was assigned to the wife of the first respondent. Ex.R2 is the receipt given by the wife of the first respondent to the second and third respondents and Ex.R3 - power of attorney executed by the first respondent to the second and third respondents. Further, a reading of the judgment and decree passed by the Trial Court in O.S.No.60 of 2003 is only against the first respondent and not against the second and third respondents. Even though the property was attached before the

judgment during the pendency of the suit in I.A.No.291 of 2003 filed by the petitioner and during the trial court no one has filed any petition to raise the attachment. However during the execution petition, the petitioner filed the petition seeking for the relief of attachment, which was attached before the judgment and to sell the same and release the decree amount out of the sale amount. But, the petitioner has not proved that the property is belonging to the first respondent/judgment debtor. It is the duty of the decree holder to prove that any property brought for sale, while executing the decree, belongs to the judgment debtor.

10. Admittedly, no decree was passed against the second and third respondents and no documents were produced to show that the first respondent/judgment debtor has got right and interest over the petition mentioned property, and no evidence was adduced by the respondents. Therefore in the absence to prove that the petition mentioned property belongs to the first respondent/ judgment debtor, the order passed by the Execution Court dismissing the Execution Petition thereby raising the attachment order passed earlier by the Trial Court does not require any interference. However the petitioner is granted liberty to file a fresh Execution Petition against the first respondent.

11. With the above observation, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Index:Yes/No
Speaking/Non speaking
lpp

To

1. The District Munsif-cum-Judicial Magistrate Court, Thirukalukundram
2. The Section Officer, V.R. Section, High Court, Madras

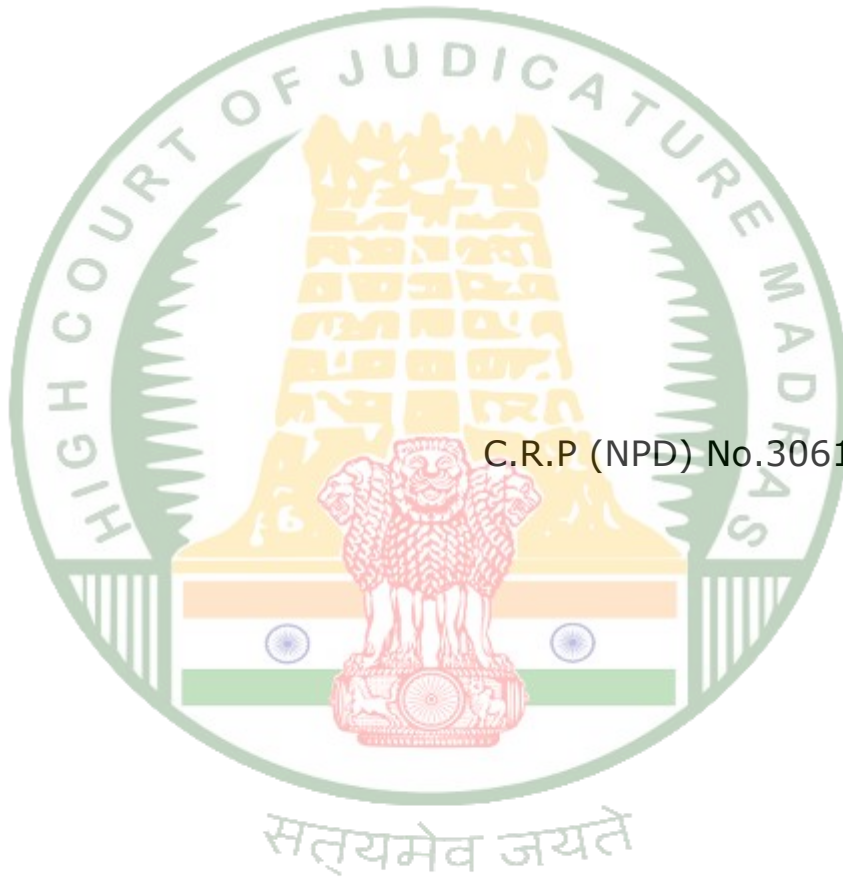


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