

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : .01.2020

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.S.A.No.1 of 2016 and C.M.P.No.256 of 2016
and
CRP (NPD) No.3079 of 2016

ElumalaiAppellant in CMSA No.1 of 2016
....Petitioner in CRP(NPD) No.3079 of
2016

Vs.

1.D.Ramanujam ... Respondent in the Appeal & 1st Respondent in
the Petition.

2. Lalitha

3. Santhanandhan ...2nd & 3rd Respondents in Revision Petition

Prayer in C.M.S.A.No.1 of 2016:

The Civil Miscellaneous Second Appeal filed against the Judgment and Decree of the Principal District Judge, Puducherry dated 30.11.2015 made in C.M.A.No.3 of 2015 confirming the order of the Principal Subordinate Judge, Puducherry dated 19.01.2015 made in I.A.No.2181 of 2004 in O.S.No.343 of 2002.

Prayer in C.R.P.[NPD] No.3079 of 2016 :

The Civil Revision Petition is filed against the fair and decreetal order of the Principal District Judge, Puducherry dated 10.08.2016 in I.A.No.986 of 2016 in Unnumbered A.S.No.-----/2016.

For Appellant / Petitioner : Mr.T.P.Manoharan
Senior Counsel for
Mr.I.Abrar MD Abdullah and
Mrs.G.Sumithra

For Respondent : T.S.Baskaran

C O M M O N J U D G M E N T

The present C.M.S.A.No.1 of 2016 and C.R.P.(NPD) No.3079 of 2016 are posted before this Court, as per the directions of the Hon'ble Chief Justice, hence this Court, has taken up both the matters for final disposal.

2. The appellant and the respondent in the C.M.S.A. No.1 of 2016 and the petitioner and respondent in C.R.P. (NPD) No.3079 of 2016 are one and the same. The appellant has filed the present C.M.S.A. against the Judgment and Decree of the Learned Principal District Judge, Puducherry dated 30.11.2015 made in C.M.A. No.3 of 2015 confirming the order passed by the Learned Principal Subordinate Judge, Puducherry dated 19.01.2015 made in I.A.No.2181 of 2004 in O.S.No.343 of 2002 raising various grounds. The present C.R.P. has been filed against the fair and decreetal order of the learned Principal District Judge, Puducherry dated 10.08.2016 in I.A.No.986 of 2016 in Unnumbered A.S.No.---/2016 by raising various grounds.

3. The appellant, in both cases, i.e., one Thiru. Elumalai seems to have purchased a house at plot situated at No.38, 1st Cross Street, Venkata Nagar, measuring an extent of 550 Sq.ft., comprised under Cadastre No.19,38,40 part, Resurvey Nos.330/8B/1A in Patta No.3319, Oulgarat Municipal limit at Saram Revenue Village, Oulgarat, Pondicherry by registered Sale Deed dated 02.01.2003 for a valid consideration of Rs.2,30,000/-, which he came to know through an advertisement in Adexpress.

4. The case of the appellant is that after registering the document, which was later referred under Section 47-A for payment of deficit stamp duty and subsequently, sufficient stamp duty has been paid and it has been released. Thereafter, the appellant came to know about the property purchased by him had an encumbrance, i.e., the mortgage due to Repco Bank of Puducherry was in existence, which encumbrance has been cleared by the appellant by paying the due amount, after purchase being a bonafide purchase, the appellant had transferred all the revenue records, such as chitta and other records in his name. Thereafter, he is in possession and enjoyment of the property, as an absolute owner. While that being the case, the appellant received a lawyer notice dated 20.11.2003, stating that the appellant would not do any speculative transaction in I.A.No.1456 of 2002 in O.S.No.343 of 2002, as the same pending. Immediately, the appellant seems to have replied to the said notice on 03.12.2003 stating that he is the bonafide purchaser and the property, which he purchased is no way connected to any financial transaction between the said respondents and the defendants in the suit in O.S.No.343 of 2002. However, despite

receiving the reply notice, the 1st respondent therein / decree holder / plaintiff had fraudulently suppressed the facts and obtained an order of attachment, as against the property purchased by the appellant herein, which he came to know only on 06.02.2004.

5. The appellant, who came to know about the attachment filed I.A.No.2181 of 2004 in O.S.No.343 of 2002 under Order 38 Rule 8, R/w Section 151 of C.P.C seeking a prayer to raise the attachment, which was made in I.A.No.1456 of 2002. To the said I.A., filed by the appellant, the respondent, being the plaintiff and decree holder had filed a counter stating that the sale is in favour of the appellant is a speculative transaction and is made only to defraud him and 2nd and 3rd respondents therein.

6. The appellant had further submitted that the documents were not handed over to the appellant by the REPCO Bank having the original title and he filed a petition before the District Consumer Dispute Redressal Forum, Pondicherry in C.C.No.31 of 2006 and obtained an order and he filed an E.P.No.14 of 2008 and the bank authorities have produced the original sale deed in his favour and has cancelled the Mortgage entry, hence it proved that the appellant is the bonafide purchaser of the said property. A counter was filed by the respondent denying all the above statements.

7. The respondent herein, had submitted that the appellant, who himself is only a mere name lender to a fraudulent sale cannot be termed as the true owner, as the appellant has purchased a property knowing fully well that there is a pendency of the suit between the respondent herein and the 2nd and 3rd respondents therein [Lalitha and Santhanandham] In fact, the respondent herein had filed application for attachment as early as 02.12.2002 to which the defendants in O.S.No.343 of 2002, were well aware have received the summons / notice from the court and did not appear. Thereafter, however, pending application, had sold the property to the appellant herein.

8. Further, the respondent herein also had stated in the counter that he had taken out a paper publication in one of Dinamalar Paper Edition, informing and issuing a warning to the general public not to enter into any sale with regard to the property, which is under attachment. He further submitted in the counter that the defendants in O.S. 343 of 2002 had entered appearance through their counsel and filed their counter. He also further submitted that apprehending that the plaintiff might file a suit, the defendants had also filed a caveat. Despite several adjournments were given by the court below, the

defendants in the suit were never ready for the enquiry and have not filed their written statement. Only after sufficient opportunity, the Principal Sub Judge, allowed the application and hence pleaded that the sale transaction between the defendants in the suit and the appellant herein is nothing, but a fraudulent, collusive and speculative sale and resisted the petition filed by the appellant seeking raising the attachment order and sought for the dismissal of the application.

9. The learned Principal Sub Judge, Puducherry passed an order on 19.01.2015 dismissing the I.A.No.2181 of 2004 in O.S.No.343 of 2002, as against which, the CMA No.3 of 2015 was filed by the appellant before the learned principal District Judge, Puducherry. The learned Judge also dismissed the appeal by Judgment and Decree dated 30.11.2015, thereby had confirmed the order passed by the learned Principal Subordinate Judge, Puducherry. The present CMSA has been filed aggrieved by the said Judgment and decree.

10. As far as CRP No.3079 of 2016 which arises out of fair and decreetal order passed in I.A.No.986 of 2016 in unnumbered A.S.No.---- of 2016 dated 10.08.2016 by learned Principal District Judge, Puducherry, and arising out of the proceedings initiated by the petitioner, Elumalai in I.A.No.32 of 2015 in E.P.No.38 of 2009 filed under Order 21 Rule 58 and Rule 97 r/w Section 151 CPC to set aside the order made in E.P.No.38 of 2009 dated 23.02.2015 on the ground that the petitioner, being a purchaser of the property for a true and valid consideration and after his purchase, the respondent had cunningly obtained an order of attachment, which came to the knowledge of the petitioner, only on 06.04.2004, when he received the notice.

11. The petitioner also claimed that he filed I.A.No.2181 of 2004 in O.S.No.343 of 2002 to raise the attachment as against an order of attachment obtained by the 1st respondent, which is pending in the said O.S. Meanwhile E.P.No.38 of 2009 was filed by the plaintiff / 1st respondent, came to be ordered on 23.02.2015, as against which, I.A.No.32 of 2015 in E.P.No.38 of 2009 was filed by the petitioner to set aside the order dated 23.02.2015.

12. The above petition came up for disposal before the learned Principal Sub Judge, Puducherry and by an order dated 30.09.2015, the said Learned Judge had dismissed the said I.A., on the ground that the purchase made by the petitioner is hit by Section 62 of Transfer of property Act, which restricts on the transfer of any property, once the suit in which any right to such immovable property directly and specifically in question is pending. Since the respondent had already filed an I.A.No.1456 of 2002, which was filed for attachment of the property,

purchased by the petitioner was pending along with the suit and that the learned Principal Sub Judge had dismissed the petition on the ground that the petitioner derived no title and he purchased the property during the pendency of the suit.

13. As against the dismissal order made in I.A.No.32 of 2015, in E.P.No.38 of 2009, the condonation of delay petition filed under Section 5 of Limitation Act was dismissed by an order dated 10.08.2016 by the Principal District Judge, Puducherry in I.A.No.986 of 2016 in unnumbered A.S.No.---of 2016, as against which, the present C.R.P. has been filed. Since both the issues arising in C.M.S.A. No.1 of 2016 and C.R.P. No.3079 of 2016, are one and the same, the common arguments are advanced by the Mr.T.P.Manokaran, learned senior counsel for the appellant and Mr.Baskar for 1st respondent.

14. Mr.T.P.Manoharan, learned senior counsel appearing for the appellant and the learned counsel appearing for the petitioner in both C.M.S.A. and C.R.P. had contended that the learned Principal District Judge, Puducherry, while dismissing the CMA No.3 of 2015 has wrongly held that the petitioner is the 3rd party to the suit and he cannot maintain an application to raise the attachment under Order 38 Rule 8 of CPC. The Senior Counsel further contended that the purchase of the property is prior to the order of attachment and hence the purchase cannot be said to be *lis pendens*, merely because an I.A., for attachment was pending at the time when the appellant purchased the property. He also contended that an application was filed to raise the attachment of property and the same was dismissed only on technical grounds and the court below had not gone into the merits of the case, especially, when the trial court has not dealt the case on merits, the appellate court, ought not to have gone into the merits of the case, while confirming the order of the trial court.

15. Mr.T.P.Manoharan, learned senior counsel appearing for the appellant represented before this Court that regarding C.R.P. No.3079 of 2016, there was only a meager delay in preferring the appeal, as against fair and decreetal order in I.A.No.32 of 2015 dated 03.09.2015. He would also submit that the reasons attributed for the delay was justified and the court below ought to have condoned the delay and ought to have taken the appeal suit on file, as the reasons were justifiable. In support of his arguments, the learned counsel relied on various Judgments, which are as follows:-

(i) (2015) 5 Supreme Court Cases page 588 [Mayadevi V. Lalta Prasad) wherein at Paragraph No. 44, it is laid down as follows:-

'The Appellant before us is a third party and has been brought into the *lis* by a side wind in that her property is

sought to be attached with the intention of satisfying a decree in which she was not directly or intrinsically concerned. The Appellant/Objector who has approached the Court under Order XXI Rule 58 is more advantageously or favourably placed inasmuch as she is a third party so far as the decree is concerned, and her property is not the subject-matter of the decree. It is thus clear to me that the Courts below have in a hurried, if not prejudiced manner, rejected the Objections merely because of some sympathy towards the Decree Holder. The Objections deserved to be allowed without disturbing the decree, leaving all other remedies open to the Decree Holder/Respondent, including proceedings against the Estate of the Judgment Debtor'.

(ii) [1990] 3 Supreme Court Cases 291 [Vannarakkal Kallalathil Sreedharan V. Chandramaath Balakrishnan and Another] at Paragraph Nos. 7 and 9 it is held as follows:-

'7. Hence under a contract of sale entered into before attachment the conveyance after attachment in pursuance of the contract passes on good title in spite of the attachment. To the same effect are the decisions of the Bombay High Court in Rango Ramchandra Kulkarni V. Gurlingappa Chyinnappa Muthal [AIR 1941 Bom 198] and Yeshvant Shankar Dunakhe V. Pyaraji Nurji Tamboli [AIR 19436 Boim 145] The High Court of Travancore - Cochin in Kochuponchi Varughese V. Ouseph Lonan [AIR 1952 TC 467] has also adopted the same reasoning.

9. In our opinion, the view taken by the High Courts at Madras, Bombay, Calcutta and Travancore-Cochin in the aforesaid cases appears to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the Judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Section 64 CPC no doubt was intended to protect the attaching creditor, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. We cannot, therefore, agree with the view taken by the Punjab and Haryana High Court in Mohinder Singh Case'.

(iii) (2007) 5 Supreme Court Cases 85 [Kunwar Pal Singh V. State of U.P.] wherein at Paragraph No.16, it is held as follows:

'16. Section 6(2), on a plain reading, deals with the various modes of publication and they are : (a) publication in the Official Gazette, (b) publication in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language, and (c) causing public notice of the substance of such declaration to be given at convenient places in the said locality. There is no option left with anyone to give up or waive any mode and all such modes have to be strictly resorted to. The principle is well settled that where any statutory provision provides a particular manner for doing a particular act, then, that thing of act must be done in accordance with the manner prescribed therefor in the Act.'

(iv) (1991) 1 Supreme Court Cases 715 [Hamda Ammal V. Avadiappa Pathar and 3 others at Paragraph Nos.5 and 6 it is held as follows:-

'5. We cannot accept the contention of learned counsel for the respondent that till registration, the execution of the sale deed does not confer any rights whatsoever on the vendee. Even Section 49 of the Registration Act in its proviso inserted by Section 10 of the Transfer of the Property (Amendment) Supplementary act, 1929, negatives the above contention of the learned counsel. The above provision lays down that an unregistered document affecting immovable property and required by this Act or by the Transfer of Property act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as an evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument. Thus even an unregistered document can be received as evidence for purposes mentioned in the proviso to Section 49 of the Registration Act.

6. Learned Counsel for the respondents also made the submission that even if the sale deed which is executed earlier to attachment before judgment and registered subsequently may be binding on the vendors but it would not affect the rights of such respondent who is a third party, in the sense that he was not a party to the sale deed and he got the right in the property in a court sale having taken place after the passing of final decree in the money suit filed by Avadiappa. In other words the contention is that

respondent Shri M.S.A.Kadar got rights in the property in the court sale made in his favour after the decree passed in favour of Avadiappa in the money suit filed on September 13, 1970. We do not find any force at all in the above submission. The property in question admittedly belonged to the defendant-Judgment debtors (vendors) and once it is held that a sale deed had already been executed by them in favour of Hamda Ammal on September 9, 1970 and only its registration remained, then neither the attachment before judgment nor a subsequent attachment or court sale in favour of respondent 5 can confer any title in his favour by preventing the relation back. The fact that the document of sale had not been registered until after the attachment makes no difference.'

(v) (2011) 3 SCC 436 [State of Orissa and Another V. Mamata Mohanty at Paragraph No.37, it is stated as follows:

'37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action / development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (vide Upen Chandra Gogoi V. State of Assam (1998) 3 SCC 380], Mangal Prasad Tamoli V. Narvadeshwar Mishra [2005] 3 SCC 422 and Ritesh Tewari V. State of U.P. (2010) 10 SCC 677).

(vi) AIR 1989 Andhrapradesh 58 [J.Rama Murthy and Others V. Srinivas Corporation General Merchants and Commission and Agents and other] at Paragraph No. 6 it is observed as follows:

'6. In view of the above discussion it is clear that there is absolutely no bar and on the other hand it is permissible as contemplated by O.38, Rr.11 and 11-A for a petition filed under O.38, R.8 to be continued even beyond the date of decree of the suit, and that the said application has got to be tried as if it is a plaint as per O.21, R.58(2) and (4).

(vii) (2008) 2 SCC 302 [Raman Tech. & Process Engg. Co., and Another V. Solanki Traders] at paragraph no.6, it is observed as under:

'6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to

another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before Judgment. (see premraj Mundru V.Md.Manech Gazi [AIR 1951 Cal 156] for a clear summary of the principles)

(viii) 2002 (4) CTC page 550 [M.Govinda Gounder V. Pichandi Pillai and another] wherein at Paragraph Nos.2,8,9 and 10 it is laid down as under:

'2. In the Claim petition, the applicant/appellant herein, contended that he had purchased the petition mentioned schedule property from the defendant/judgment-debtor and also from his son for a valid consideration of Rs.7,900/- on 19.9.1985 by a registered sale deed and since then he is in possession and enjoyment of the property as a bona fide purchaser. The appellant came to know that on 1.4.1987 that the respondent/plaintiff had obtained a money decree against the defendant and had attached the schedule property. According to the appellant, he had purchased the property before the attachment and he had no knowledge about the debt of the defendant or decree against the defendant. The defendant had no right or title over the schedule property as on the date of the attachment as he had already purchased the same on 19.9.1985 itself. Therefore, the attachment made by the plaintiff was illegal and invalid and the petitioner prayed for the removal of the attachment over the property.

8. I have considered the submissions of learned counsel for the appellant. It is not disputed as could be seen from the records that the claimant has purchased the property on 19.9.1985 whereas the attachment was only subsequent to that namely, on 10.10.1985. Therefore, the burden to prove that the purchase was to defraud the creditor is very much on the plaintiff. A perusal of the counter filed by him shows that the counter is a very short one bereft of details except for stating that the purchase was not bona fide. Curiously the plaintiff has not got into the box; nor has he produced any other evidence to support his claim that the sale is vitiated by fraud. Ultimately the burden to prove the allegation of fraud is very heavy on the person pleading fraud and in the present case the plaintiff has not made any attempt to adduce any evidence. I am inclined to hold that on that basis alone the defence of the plaintiff ought to have been rejected by the Courts below.

9. A further ground which is mainly relied on by the Courts below to have come to the conclusion that the sale by the plaintiff/defendant was not bona fide is that while the claimant contends that he had discharged the loans due to the Co-operative Agricultural Bank; recitals in the sale deed do not reflect the said fact. According to the Courts below, the recitals disclose that the amount was paid to the vendor.

10. I am unable to come to any adverse conclusion only on the basis of the said fact. It is seen that the purchaser/appellant herein has filed Exs.A.3 to A.7 being receipts issued by the Agricultural Co-operative Bank for the discharge of the amounts by instalments. All the said payments have been made prior to the completion of the sale. Much importance cannot be attached to the recitals in the sale deed which are incorporated only with a view to comply with the formality to state that full consideration has been received. Even in the sale deed, all that is stated is that the sale was being effected for the discharge of the loan due towards the Co-operative Bank and also for family expenses. Therefore, the alleged contradiction between the evidence of the appellant/claimant and the recitals of the document, cannot result in ignoring the transaction and holding that the transaction was fraudulent.'

and prayed for allowing the appeals.

16. Mr.T.S.Baskaran, learned counsel appearing on behalf of the respondent vehemently contended both C.M.S.A as well as C.R.P. have to be dismissed. He submitted that the petitioner, who claims to have purchased the attached property was only a mere name lender and had purchased the property in collusion with the defendants in O.S.No.343 of 2002. The respondent had filed an application for attachment as early as 02.12.2002, the same was known to the appellant, as the respondent in the petition filed seeking for attachment was the defendant in the suit, who filed initially a caveat against respondent/plaintiff from obtaining the interim orders. In fact, he vehemently argued that the counsel who appeared for the defendants in the suit as well as the respondents in the attachment petition are one and the same, who appeared for the appellant in the trial court as well as before the appellate court. In fact, the same counsel appeared for the purchaser as well as the vendor, namely, Advocate, Karunamoorthy, who took notice and gave a reply on behalf of the appellant / purchaser. The learned counsel also contended that when the counsel did not appear before the court below and not filed a counter and written statement for the defendants and appeared for the appellant in the court below would show that the transaction between the appellant/purchaser and the vendors, who were the defendants in the suit and the respondent in the attachment petition, the

transaction between them were fraudulent, collusive and speculative in nature.

17. The counsel also further argued that Section 52 of Transfer of Property Act, which clearly prohibits any transaction during the pendency of the suit or any proceedings in the court, which is not collusive, the property cannot be transferred or otherwise dealt with by any party to the suit. Since the purchase made by the appellant/ purchaser claiming himself as a bonafide purchaser, which itself is a collusive purchase, which is clearly hit by Section 52 of Transfer of Property Act and hence the fair and decreetal order made in I.A.No.2181 of 2004 dated 19.01.2015 dismissing the petition filed by the petitioner to raise the attachment, which later came to be confirmed in C.M.A. No.3 of 2015 dated 30.11.2015 has to be confirmed.

18. The counsel for the respondent / plaintiff would further submit that as far as the C.R.P. No.3079 of 2016 is concerned, the petitioner had applied for certified copy of fair and decreetal order made in I.A.No. 32 of 2015 on 05.10.2015 itself, however, his plea before the learned Principal District Judge, Puducherry was that he came to know the disposal of the application in E.P.No.38 of 2019, only at a later point of time, is contrary to the truth and the delay of 160 days were not properly explained and the petitioner had approached the Court with unclean hands. Hence he prayed that the Court has to dismiss the revision petition filed by the appellant / petitioner. In support of his argument also, the learned counsel for the respondent also relied on AIR 1963 SC 1150 [C.Abdul Shukoor Saheb V. Arji Papa Rao (Deceased) after him his heirs and legal representatives and others] and an unreported Judgment in Application Nos.1034 and 1035 of 2019 in E.P.Nos. 70 and 71 of 2016 dated 28.02.2009 delivered by this Court. The learned counsel would pray that both the C.M.S.A. and the C.R.P. has to be dismissed.

19. Heard the learned counsels on either side and perused the materials available on record.

20. From the records produced it is seen that O.S.No.343 of 2002 was originally filed by the respondent as against the defendants, viz., Lalitha and Santhanathanam for recovery of money on the strength of the promissory note for Rs.4,50,000/-, which is executed in favour of the respondent / plaintiff in a suit by the above said two persons, who were the defendants in the original suit. Pending the said suit, I.A.No.1456 of 2002 was filed for attachment of the property. It is not disputed by the learned counsel for the appellant and the petitioner that caveat has also been filed by the said defendants and the

respondent before the lower court. The court below, since no counter was filed in I.A.No.1456 of 2002, has ordered attachment as early as on 16.03.2004. Meanwhile, it is seen from the records and pleadings before the trial court as well as the appellate court that the appellant cum petitioner K.Elumalai had filed I.A.No.2181 of 2004 in O.S.No.343 of 2002 claiming himself, as a bonafide purchaser through a registered sale deed dated 02.01.2004 had approached the trial court to raise the attachment dated 16.03.2004 in I.A.No.2181 of 2004.

21. On hearing the oral submission made by the respective counsels, it is clear that as on the date of purchase made by the appellant/petitioner, so called bonafide purchaser in C.M.S.A No.1 of 2016 and C.R.P. No.3079 of 2016 respectively and who claim to have purchased the scheduled mentioned property in I.A.No.1456 of 2002 on 02.01.2003, when I.A.No.1456 of 2002 was pending adjudication, at that point of time. This is in conformity with the arguments put forth by the learned counsel for the respondent that the purchase made by the appellant/petitioner is hit by Section 52 of Transfer of property Act and same is reproduced herein.

'52. Transfer of property pending suit relating thereto during the pendency in any court having authority 3[4 [within the limits of India excluding the State of Jammu and Kashmir] Government or established beyond such limits] by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.'

22. On a careful reading of the said provision, the said Section 52 imposes the prohibition of transfer of any property during the pendency of the suit provided that the suit is not collusive. Any transfer made pendent, such transfer are not void, but voidable, at the option of the affected party of the proceedings, pending which the transfer is affected. The document of lispendense is also emphasised the notice of pendency of the suit or any proceedings of the court. It is immaterial whether the alleged purchaser had any notice or not, as the purchaser is the one, who has to ascertain the pendency of the suit with regard to the property, which he intense to purchase. The term 'caveat emptor' [buyer beware] would suffice that buyer has to be very careful while dealing with or while dealing with a purchase of a property.

23. As far as the present case on hand is concerned, it is clear from records that the defendants in the suit from whom the appellant /petitioner purchased the suit property in fact had filed a caveat petition before the Principal Sub Judge, Pondicherry at the very inception of the notice in the suit. However, despite the notice received by the caveat, no steps were taken by the defendants in the suit from whom the appellant / purchaser had purchased the property. It is only thereafter, receiving the initial notice, the appellant / petitioner has purchased the attached property from the defendants, when the application seeking attachment in I.A.No.1456 of 2002 was pending. Though the sale was made by the defendants in the suit to the present appellant-petitioner on 02.01.2003 and the attachment was subsequent to the sale, however, the sale is pendent sale, which is squarely hit by Transfer of property Act. It is also seen that the counsel appearing for the said defendants and the counsel appearing for the appellant before the said court are one and the same. Hence he had no knowledge, cannot be pleaded here.

24. It is also seen that the application filed by the appellant /petitioner to raise the attachment was made in I.A.No.1456 of 2002 was dismissed on valid grounds. No doubt an application was filed under Order 38 Rule 2 of CPC can be continued even after a decree of the suit, provided the claim made under Order 38 Rule 2 CPC should not be fraudulent. As far as the present case on hand, it is categorically clear that the counsel for the defendants in the suit also represented the appellant / petitioner in the trial court as well as before the appellate court. It is clear that both the defendants in the suit as well as the alleged bonafide purchaser, who is the appellant / petitioner in the present C.M.S.A and C.R.P. have colluded to defeat the rights of the respondent under the decree.

25. The citations referred by the appellant / petitioner is not applicable to the present case, as the facts of those cases are totally different, which aids only to the bonafide purchaser and not for a collusive and fraudulent sale. Here, in the case, on perusal of record it is seen that it is a collusive sale made by the defendants in O.S.No.343 of 2002 in favour of the appellant when the application for attachment was pending, the defendant has also filed a caveat petition before the court below would show that the sale is only a fraudulent sale.

26. As far as the C.R.P.No.3079 of 2016 is concerned, it is categorically clear that the respondent who filed O.S.No.343 of 2002 for recovery of money due under a promissory note executed by the defendants therein in favour of the respondent herein. After obtaining a decree, he had also filed a E.P.Petition in E.P.No.38 of 2009 despite the suit itself being decreed in favour of the respondent as early as 09.06.2005 and no appeal

has been filed by the defendants therein and the respondent had filed E.P.No.38 of 2009, which came to be ordered as early as on 23.02.2015. I.A.No.32 of 2015 came to be filed by the petitioner in C.R.P.No. 3079 of 2016 to set aside the order in E.P.No.38 of 2009 dated 23.02.2015, which came to be dismissed on the ground that the sale was hit by Section 52 of Transfer of property Act. The dismissal order was passed as early as on 30.09.2015, during which period the appellant / petitioner had filed an I.A.No.2181 of 2004 in O.S.no.343 of 2002 to raise the attachment made in I.A.No.1456 of 2002 in O.S.No.343 of 2002. However, as against the dismissal order, the appellant / petitioner preferred the appeal belatedly with a delay of 160 days in preferring the appeal.

27. On perusal of grounds as well as the arguments made by the learned counsel for the appellant / petitioner, this Court is in conformity with the order passed by the learned Principal District Judge, Puducherry dismissing the petition on the ground that the petitioner had sufficient knowledge of the order passed an I.A.No.32 of 2015 as early as 05.10.2015 on which day, the copy application was filed by the appellant/ petitioner and the reasons attributed for the delay is not justifiable.

Under these circumstances, this Court is of the view that both the C.M.S.A as well as C.R.P. fails and accordingly, both are dismissed. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS-III-MDU)

//True copy//

Sub Assistant Registrar

ssd

To

1. The Principal District Judge, Puducherry.
2. The Principal Subordinate Judge, Puducherry.
3. The Section Officer, VR Section,
Madras High Court, Chennai

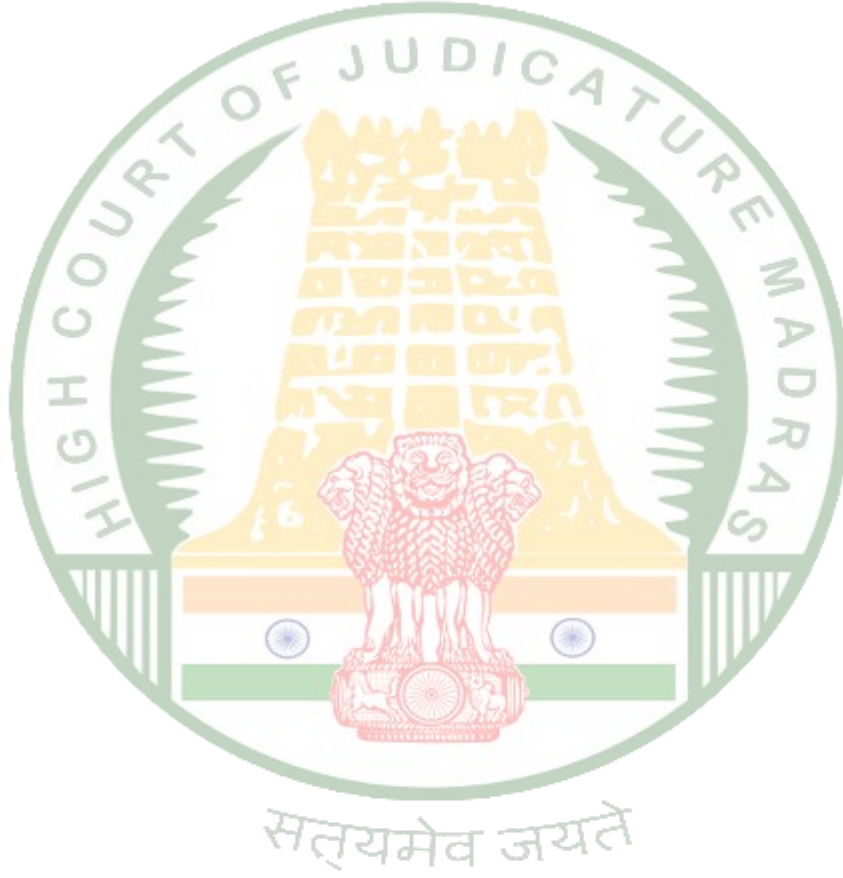
Copy To
The Section Officer,
VR Section,
Madras High Court, Chennai

+1cc to Mr.T.S.Baskaran, Advocate SR.No.7358

+1cc to Mr.G.Sumithra, Advocate SR.No.7573

C.M.S.A.No.1 of 2016 and
CRP (NPD) No.3079 of 2016

SSI (CO)
GMY (31/07/2020)



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