IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.12.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.1849 of 2020

Annadurai
S/o Chinnan .. Appellant

-vs-

1. Chinnusamy
   S/o Arumugam (a) Dharman
2. Sellamariappan
   S/o late Subbaiah
3. Thangam
   W/o Sellamariappan .. Respondents

Memorandum of Grounds of Civil Miscellaneous Appeal filed under Order XLIII, Rule 1(r) of the Code of Civil Procedure, against the order dated 27.06.2018 in I.A.No.178 of 2018 in I.A.No.694 of 2013 in O.S.No.247 of 2013 on the file of the III Additional District Judge, Salem.

For Appellant :: Mr.D.Shivakumaran

For Respondents :: Mr.P.Jagadeesan for R1

JUDGMENT

Heard learned counsel for the parties through video conferencing due to the Covid-19 pandemic.

2. This civil miscellaneous appeal is directed against the impugned decretal order dated 27.6.2018 passed in I.A.No.178 of 2018 in I.A.No.694 of 2013 in O.S.No.247 of 2013 by the learned III Additional District Judge, Salem rejecting the request to lift the attachment order in favour of the appellant.

3. Mr.D.Shivakumaran, learned counsel appearing for the appellant, who is the third party purchaser of the suit property, submitted that originally when the suit was filed by the first respondent/plaintiff in O.S.No.247 of 2013 for recovery of a sum of Rs.14,35,000/- from the defendants, he also moved an application in I.A.No.694 of 2013 on 25.9.2013 under Order 38, Rule 5 read with Section 151 of the Code of Civil

Procedure seeking an order of attachment of the petition mentioned property before judgment. Opposing the claim, the defendants, vendors of the appellant filed a detailed counter affidavit denying the very execution of the promissory note dated 24.4.2011 stating that the said promissory note has been concocted and manufactured behind their back. However, the trial Court, taking on board the I.A.No.694 of 2013, passed an order on 25.9.2013 holding that a prima facie case has been made out, therefore, the defendants should furnish security for the claim amount. As the defendants failed to furnish security in spite of the opportunities granted, the order of attachment before judgment was passed on 30.10.2015. But much before the order of attachment was passed, the suit property was physically handed over to the appellant/third party purchaser, by virtue of the sale deed dated 7.10.2013 and also the power of attorney dated 5.11.2012 executed in favour of the appellant. When a detailed counter affidavit has been filed by the defendants, vendors of the appellant that the suit property had already been handed over to the appellant, it goes without saying that even the order of attachment dated 30.10.2015 also cannot be legally sustainable in law. While so, the sale that took place on 7.10.2013 will be valid in law, therefore, the order of attachment passed on 30.11.2015 cannot have any impact on the sale that took place much prior to that on 7.10.2013. This legal proposition has been completely overlooked by the trial Court. Therefore, the appellant filed I.A.No.178 of 2018 in I.A.No.694 of 2013 in O.S.No.247 of 2013 before the trial Court. However, the learned III Additional District Judge, Salem has passed the order of attachment before judgment, ignoring the fact that the I.A.No.694 of 2013 was filed on 25.9.2013 itself seeking for attachment before judgment, which is not correct.

4. This Court is unable to agree with the said contentions. A careful perusal of the impugned decretal order dated 27.6.2018 clearly shows that the trial Court, while considering the I.A.No.694 of 2013 seeking an order of attachment before judgment, has passed an interim order on 25.9.2013 stating that a prima facie case has been made out and balance of convenience also has been in favour of the plaintiff, on that basis, the defendants were directed to furnish security for the claim amount. Again for furnishing security, several opportunities were given to the defendants, as could be seen from the record that the interlocutory application came to be listed on 10.10.2014, 15.10.2014, 28.10.2014, 3.11.2014, 19.11.2014, 22.12.2014, 21.1.2015, 12.2.2015, 3.3.2015, 17.3.2015, 17.4.2015, 8.6.2015, 26.6.2015, 1.8.2015, 10.8.2015, 19.8.2015, 21.8.2015 24.8.2015, 25.8.2015 and 23.9.2015 for such purpose. Since on all these dates, there was a specific direction directing the defendants to furnish security and no effort or care was taken by the defendants to furnish security, the trial

Court, by virtue of Order 38, Rule 5 read with Section 151 of the Code of Civil Procedure, satisfying with the conditions mentioned in sub-rules (1)(a), (b),(c), (2) & (3), has rightly passed the order of attachment before judgment. Therefore, the contentions placed before me by Mr.D.Shivakumaran that the trial Court has committed an error, are far from acceptance. Moreover, when Sections 52 & 53 of the Transfer of Property Act deal with the doctrine of lis pendens, since the suit was filed on 20.9.2013 and the order has been passed in the I.A.No.694 of 2013 after giving opportunities to furnish security, without furnishing security, the defendants have alienated the property on 7.10.2013 in favour of the appellant/third party purchaser to defraud the first respondent/plaintiff. It is pertinent to extract Sections 52 & 53 of the Transfer of Property Act herein below for perusal:-

> "S.52.Transfer of property pending suit relating thereto: During the pendency in any court having authority 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.
>
> Explanation: For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.
>
> S.53.Fraudulent transfer: (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the

> transferor shall be voidable at the option of any creditor so defeated or delayed.
>
> Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.
>
> Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.
>
> A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.
>
> (2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.
>
> For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

5. A careful reading of Section 52 with its explanation tells us that the pendency of a suit or proceeding shall be deemed to commence from the date of presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction. Therefore, not only the filing of a suit but also filing an interlocutory application in the pending suit seeking an order of attachment before judgment of the property belonging to the defendant more clearly speaks that Section 52 will apply to all suits. Besides, Section 52 and Section 53 are natural allies like two legs required for a man or woman to walk. If we do not use both legs simultaneously, no one would be able to rise and walk on the road. No doubt, even by using one leg also one can move, but that would be unwise and unnatural, therefore, they shall be read together whenever the doctrine of lis pendens is invoked. Isolated reading of Section 53 will not achieve the purpose and object of Section 53 of the Transfer of Property Act. If we read Section 53, it will convey a clear guidance to avoid fraud to be perpetuated against a honest litigant. Similarly, doctrine of lis pendens is to avoid fraud

and manipulation. Hence, a joint reading of both Sections 52 & 53 of the Transfer of Property Act would avoid unnecessary doubt and debate. Therefore, the appellant, in my considered opinion, cannot be treated as a bona fide purchaser, on the premise that both the appellant and the defendants, colluding with each other, to defraud the plaintiff to defeat the pending proceedings, have alienated the suit property, hence, such transfer will be hit by Sections 52 & 53 of the Transfer of Property Act. Therefore, when the appellant has circumvented the law under Sections 52 & 53 of the Transfer of Property Act, finding no infirmity in the impugned decretal order, the civil miscellaneous appeal fails and it is dismissed. Consequently, C.M.P.No.13697 of 2020 is also dismissed. No costs.

Sd/-
Assistant Registrar (C.O.)

/True Copy/

Sub Assistant Registrar

To

The III Additional District Judge, Salem

+1cc to Mr.P.Jagadeesan, Advocate SR.NO..41017
+1cc to Mr.D.Shivakumaran, Advocate SR.NO..41028

AKM/16.03.21/ 5P- 4C/

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