

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.02.2021

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.S.A.No.9 of 1998
and
C.M.P.Nos.3335 & 3336 of 1998

Chinnamani .. Appellant/Petitioner
Vs.

1. Dhanalakshmi Finance Corporation,
rep.by its Managing Partner K.Vijayakumar
S/o.K.G.Krishnasamy Chettiar
27, New Majjit Street,
Polur, Tiruvannamalai District.
2. T.Rajan Pillai
3. J.Saraswathi
4. Dr.Sureka
5. Manjula .. Respondents

Prayer : Civil Miscellaneous Second Appeal filed under Section 100 & 108 of Code of Civil Procedure against the judgment and decree on the file of the Court of the Additional District Judge, Tiruvannamalai in confirming the fair and final order dated 01.09.1992 passed in E.A.No.488 of 1981 in R.E.P.No.131 of 1979 in O.S.No.97 of 1976 on the file of the Principal District Munsif Court, Tiruvannamalai.

For Appellant सत्यमेव जयते : Mr.P.Mani

For Respondents : No appearance for R1
Mr.T.R.Raja Raman for R2
R3 to R5 - Batta due

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J U D G M E N T

The judgment and decree dated 19.12.1997 passed in C.M.A.No. 36 of 1997 confirming the fair and decretal order dated 01.09.1992 passed in E.A.No.488 of 1981 in R.E.P.No.131 of 1979 in O.S.No.97 of 1976, is under challenge in the present Civil Miscellaneous Second Appeal.

2.The substantial questions of law raised by the appellant reads as under:

"A.Whether in law the appellant is entitled to $\frac{1}{2}$ share in the property sold as per the partition deed dated 12.02.1963 and the Court auction sale is liable to be set aside in so far as the appellant's $\frac{1}{2}$ share when admittedly the judgment debtor's right to the property accrued only through the said partition deed?

B.Whether in law the flaw in the attachment of the property vitiates the sale and whether the court auction sale could be set aside on this ground as per the dicta laid down by this Hon'ble Court in Kamatchi Ammal vs. N.Babu and another (C.N.S.A.No 57 of 1985 dated 19.11.1997)?

C.Whether the application filed by the appellant to set aside court auction sale under Order 21 Rule 90 is barred by limitation when the appellant is a third party and entitled to half share in the property sold and when Art. 136 of the Limitation Act 1963 is applicable to the facts of the present case?"

3. Though the substantial questions of law raised in A & B are relatable to the factual matrix of the case, the learned counsel for the appellant reiterated that the point of limitation decided by both the Courts are erroneous. The appellant filed a petition under Order 21 Rule 90 C.P.C to cancel the auction sale. The Trial Court considered the facts and circumstances and arrived a finding that no illegality or irregularity as alleged by the appellant has occurred in the Court auction sale and further the petition itself was filed belatedly and accordingly there was no irregularity regarding the auction and dismissed the petition.

4. The appellant preferred C.M.A.No. 36 of 1997 and the first Appellate Court elaborately adjudicated the facts and circumstances. The fact remains that the petitioner has filed a petition under Order 21 Rule 90 C.P.C. which is barred by limitation. Though, the Court auction sale was held on 23.01.1980, the appellant has filed the petition only on 24.03.1980, thus the petition is barred by the limitation.

5. The first Appellate Court considered the manner through which the period is to be reckoned for calculating limitation even on merits. The first Appellate Court arrived a conclusion that the contention of the appellant is unacceptable, even recording the point that no notice was issued for attachment before the judgment. The first Appellate Court considered with

reference to Order 38 Rule 5 C.P.C., the lower Court without giving notice to the third respondent, before the first Appellate Court, has attached the property mentioned in the schedule before the judgment. The sale held on 23.01.1980, is liable to be set aside accordingly. The first Appellate Court found that the Trial Court had issued notice to the third respondent on 22.02.1976 but attachment before judgment was made only on 03.12.1976. Thus, the Court cannot come to the conclusion that without giving notice to the third respondent, the Trial Court has effected attachment before judgment

6. Accordingly, the first Appellate Court considered the explanation provided under 21 Rule 90 C.P.C wherein it is stipulated as "the mere absence of or defeat in attachment of the property sold shall not by itself be a ground for setting aside a sale under this rule".

7. Relying on the facts and circumstances, the first Appellate Court arrived a conclusion that the appellant is having half share in the property mentioned in the schedule and therefore, the appellant has no hesitation to question the same.

8. This Court is of the considered opinion that the attachment before the judgment was made on 03.12.1976 and the Court auction sale was held on 23.01.1980 and the Trial Court and the First Appellate Court confirmed the same on 01.09.1992 and 19.12.1997 respectively. Almost 40 years had lapsed from the date of Court auction sale.

9. Under these circumstances, this Court is not inclined to consider the case of the appellant and accordingly the judgment and decree dated 19.12.1997 passed in C.M.A.No.36 of 1997 confirming the judgment and decree dated 01.09.1992 passed in E.A.No.488 of 1981 in R.E.P.No.131 of 1979 in O.S.No.97 of 1976 stands confirmed. Consequently, C.M.S.A.No.9 of 1988 stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

Pns

To

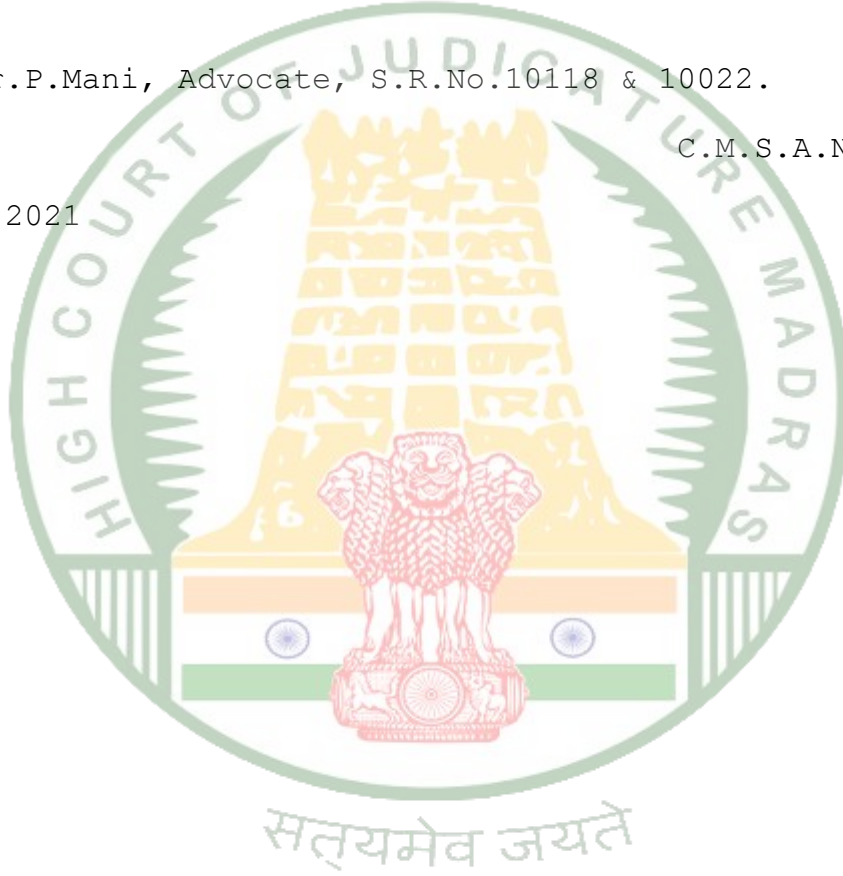
1. The Additional District Judge,
Tiruvannamalai.
2. The Principal District Munsif Court,
Tiruvannamalai.

Copy to: The Section Officer,
V.R. Section,
High Court, Madras.

+2cc to Mr.P.Mani, Advocate, S.R.No.10118 & 10022.

C.M.S.A.No.9 of 1998

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CSR 09.04.2021



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