

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.26 of 2007 and
M.P.No.1 of 2007

U.Sampath Gupta .. Appellant/ 1st Respondent

Vs.

1.C.Somasundaram ..1st Respondent/Claim Petitioner

2.R.Sundararajan ..2nd Respondent/Judgment Debtor

Prayer : Civil Miscellaneous Second Appeal filed under 100 of C.P.C., against the judgment and decree passed in C.M.A.No.10 of 2003 on the file of Principal District Court, Chengalpet dated 15.11.2005, reversing the order and decreetal order passed in E.A.No.442 of 2001, in E.P.No.76/2000 in O.S.No.8072/1995 on the file of the Subordinate Court, Poonamallee dated 10/01/2003.

For Appellant : Ms.R.Ramya for
Mr.T.V.Krishnamachari

For Respondents : Mr.M.V.Seshachari for R1
Mr.A.Palaniappan for R2

J U D G M E N T

The judgment and decree dated 15.11.2005 in C.M.A.No.10 of 2003 reversing the fair and decreetal order dated 10.01.2003 passed in E.A.No.442 of 2001 in E.P.No.76 of 2000 in O.S.No.8072 of 1995 is under challenge in the present civil miscellaneous second appeal.

2. The substantial questions of law raised by the learned counsel for the appellant is that whether the undertaking given by the judgment debtor before the Court in his counter in interlocutory application would be binding or not. Whether the sale deed executed in favour of the first respondent Mr.Somasundaram who was the neighbour of the judgment debtor, is entitled to claim under the guise of an innocent party with reference to the decree passed in favour of the appellant.

3. The facts in nutshell to be considered are that on 11.10.1992, the second respondent /defendant had executed a demand promissory note for a sum of Rs.60,000/- in favour of the appellant. The second respondent /defendant had appointed one Mrs.Lalitha, as a power of attorney agent in respect of E.P. Premises on 15.10.1992. The suit in O.S.No.8072 of 1995 was filed by the appellant on 17.11.1995, before the first Assistant City Civil Court, Chennai, as against the second respondent for recovery of a sum of Rs.92,000/- with subsequent interest and costs. An interim injunction petition was filed by the appellant along with the suit seeking attachment before judgment and injunction not to alienate the property in I.A.Nos.16190 & 16191 of 1995 in O.S.No.8072 of 1995. On 19.09.1996, the second respondent filed a counter in I.A.Nos.16190 & 16191 of 1995, the second respondent in his counter had given a undertaking that he will not alienate the property.

4. The suit was decreed in favour of the plaintiff on 07.04.1999 in O.S.No.8072 of 1995. The decree holder / plaintiff filed E.P.No.76 of 2000 before the Sub Court, Poonamallee on 19.02.2000, after transmission of the decree. After filing of the execution proceedings by the plaintiff, the second respondent /defendant had conveyed the suit property to the first respondent on 25.02.2000. On 14.12.2000, the execution Court passed an order of attachment in E.P.No.76 of 2000. On 29.01.2001, notice of attachment was passed in the property through which the first respondent /third party came to know about the attachment in respect of the property to be purchased.

5. On 16.02.2001, the first respondent / third party filed a claim petition in E.A.No.442 of 2001 under Order 21 Rule 58 of C.P.C. to remove the order of attachment in respect of the property purchased from the second respondent. On 10.01.2003, the Sub Court, Poonamallee passed an order dismissing the claim petition in E.A.No.442 of 2001 on the ground that the sale deed in favour of the first respondent/third party is subsequent to the undertaking given by the second respondent / defendant. Therefore, the sale deed became invalid. On 20.03.2003, the first respondent / third party claimant filed an appeal in C.M.A.No.10 of 2003 before the Principal District and Sessions Judge, Chengalpattu. The petition in I.A.No.1011 of 2003 was filed by the first respondent /third party claimant in C.M.A.No.10 of 2003 to receive two additional documents viz., power of attorney deed dated 15.10.1992 and encumbrance certificate for the period from 01.01.1987 to 07.04.2003. On 15.11.2005, C.M.A.No.10 of 2003 was allowed by the Principal District and Sessions Court, Chengalpattu and the claim in E.A.No.442 of 2001, was also allowed.

6. The findings of the first Appellate Court states that the undertaking given by the second respondent / defendant in I.A.Nos.16190 & 16191 of 1995 was neither recorded nor an order of attachment was passed pursuant to the said undertaking. Thus, the purchase of the first respondent / third party earlier to the order of the attachment passed by the E.P.Court is valid and consequently, the claim petition was allowed. Challenging the said judgment, the decree holder plaintiff filed the present second appeal.

7. The learned counsel for the appellant mainly contended that the entire sale between the first and second respondents is a collusive sale and therefore, the first Appellate Court has committed an error in allowing the C.M.A. filed by the first respondent. The learned counsel for the appellant is of the opinion that the undertaking given by the second respondent in the interlocutory application is binding in view of the fact that it is his own undertaking before the Court of law and he was fully aware of the fact that the decree was passed against him in the original suit and therefore, the subsequent sale executed after passing of the decree is to be considered as collusive sale and further stated that both the first and second respondents are neighbours residing in opposite houses at No.17, Nambi Street, Poonamallee. Thus, both of them were aware of the litigation between the appellant and the second respondent and the first respondent was fully aware of the decree passed. Even assuming that the first respondent is an innocent purchaser, he has not taken any steps of repay the decree amount and contrarily, all along litigating the matter along with the first respondent who is the third party purchaser.

8. The learned counsel appearing on behalf of the first respondent / third party purchaser mainly contended that the undertaking given by the second respondent in his counter before the Trial Court, is not binding and not constituting a charge in respect of the property purchased by the first respondent from the second respondent through a valid sale deed. Admittedly, the sale deed was executed after passing the decree in the suit. The suit is for recovery of money. Thus, the property is no way connected with the suit and in the absence of any attachment order by the Court, there is no impediment for execution of sale and therefore, the rights of the first respondent to purchase a property is to be protected.

9. The learned counsel for the first respondent reiterated that the first respondent is a bonafide purchaser and he was not aware of the litigation between the appellant and the second respondent and absolutely he has no knowledge about the decree passed against the second respondent. Thus, the decree cannot be made to operate against the first respondent who is a third

party purchaser. In reliance, the learned counsel for the first respondent cited a judgment of the Hon'ble Supreme Court of India, in the case of K.Muthuswami Gounder Vs N.Palaniappa Gounder reported in 1998 CJ SC 426, wherein, the Hon'ble Apex Court ruled that "an undertaking" which would not amount to a charge.

10. This Court cannot have any other opinion with reference to the principles cited by the learned counsel for the first respondent. The mere undertaking would not constitute a charge on the property, in the absence of an order of attachment by the competent Court. Citing the above proposition, it is contended that on the date of sale, there was no impediment for execution of deed. Therefore, the sale executed cannot be found fault with.

11. In reply, the learned counsel for the appellant objected by stating that the sale deed indicates the sale consideration in entirety was paid by cash. In the absence of proper mode of payment regarding the sale of property, there is a possibility of doubt and in the present case, the respondents 1 and 2 were neighbours during the relevant point of time and residing in opposite houses at Nambi Street, Poonamallee. Thus, there was a probability for collusion and such a probability cannot be ruled out.

12. Considering the arguments of the respective learned counsels appearing on behalf of the appellant and the respondents, this Court is of the opinion that beyond certain factual aspects, preponderance of probabilities and the manner in which the parties acted to the dealings should be considered by the Courts. In a common parlance, people always attempt to act in a smart manner if there is an intention to defeat the decree or other borrowings. More specifically, in civil litigations, such practices are being adopted by the parties either to defeat the decree or to prolong the realization of the decree or to continue the litigation one way or the other by raising unnecessary doubts or act in a clever manner so as to defeat the realization of money pursuant to the decree. All these complex facts and circumstances cannot be brushed aside by the Courts while dealing with such kind of matters. Straight jacket formula cannot be adopted in such civil litigations in order to provide substantial justice to the parties. Therefore, certain facts and circumstances are to be viewed in consonance with the intention as well as the manner in which transactions were undertaken by the parties to the litigation.

13. It is an admitted fact that the appellant filed a suit for recovery of money. It is further admitted that an undertaking was given by the second respondent in his counter in

the interlocutory application. It is an admitted fact that the Court has not passed any orders creating the charge during the pendency of the civil suit. Admittedly, the order of attachment was issued on 14.12.2000 by the Execution Court in E.P.No.76 of 2000. Thus, the sale deed was executed in respect of the suit property in favour of the first respondent on 25.02.2000 before the order of attachment and further, after the decree passed in O.S.No.8072 of 1995 on 07.04.1999. However, the fact remains that E.P.No.76 of 2000 was filed by the appellant on 19.02.2000 itself. Thus, the sale deed was executed in favour of the first respondent during the pendency of the execution proceedings. Thus, for all purposes, such a sale deed executed is to be construed as pendente lite purchase.

14. Now, the question arise is whether such purchase made during the pendency of execution proceedings can be validated, when the intention of the parties are to defeat the decree passed by the Civil Court. Usually, the Courts would not encourage the purchase during the pending of E.P proceedings. The second respondent, owner of the property was very much aware that the execution proceedings were pending before the competent Court. Thus, hurriedly, he acted and executed the sale in favour of the first respondent who is none other than the neighbour residing in an opposite house. Thus, there is every reason to believe that the sale deed was executed to fructify the decree passed in the original suit. This exactly is the preponderance of probabilities which would have been considered by the Courts. In the present case, the Trial Court accepted the contentions of the appellant and confirmed the attachment. However, the first Appellate Court proceeded on the fact that the undertaking given in the counter had not created a charge on the property and therefore, the first respondent is an innocent purchaser.

15. Undoubtedly, an undertaking in a counter by the party would not create a charge unless an order is passed by the competent Court. There is no quarrel on this proposition. However, the conduct of the parties are important to arrive a conclusion whether such a sale is to be validated or not. Though such an undertaking would not create a charge on the property, certainly, an undertaking would create a moral obligation on the parties to repay the decree amount or to defend the case properly. Contrarily, in the present case, the second respondent had not repaid the decree amount to the appellant nor honoured his undertaking filed before the Trial Court and further gone to the extent of executing a sale deed in favour of the first respondent during the pendency of the E.P proceedings. Thus, the sequences of facts reveals that there was an intention on the part of the second respondent to defeat the decree by not paying the decree amount to the appellant.

16. Even during the pendency of the E.A proceedings or before the first Appellate Court, neither the second respondent nor the first respondent who claims to be the bonafide purchaser, had not taken any steps to repay the decree amount which is an amount borrowed by the second respondent from the appellant. The Court can atleast accept the genuinity of the respondents if the decree amount had been paid during the pendency of the E.P proceedings or after the sale of the property or atleast during the pendency of C.M.A. Proceedings before the first Appellate Court.

17. Considering the facts and circumstances, this Court is able to arrive a conclusion that through out, the second respondent in collusion with the first respondent, had acted against the interest of the appellant and not even paid the principle amount which was borrowed from the appellant. Undoubtedly, the first respondent was not a party to the civil suit, however, he had a knowledge subsequently. Thus, he cannot be construed as an innocent party in respect of all proceedings.

18. The Trial Court in E.A. Proceedings filed by the first respondent, dismissed the plaint on the ground that the execution petition was filed by the appellant on transmission. In the above E.P proceedings, the judgment debtor refused to receive the private notice which was found in the case records. Thus, attachment order was passed. After passing the order of attachment, the claim petitioner has come forward with a claim petition by filing an E.A. Under those circumstances, the E.A.Court arrived a conclusion that the undertaking given by the second respondent would operate.

19. This Court is of the considered opinion that the undertaking would not create a charge nor operate against the respondents. However, beyond the undertaking given, this Court is of the opinion that the sequence of facts and circumstances reveals that both the respondents had colluded each other and attempted to defeat the realization of decree amount which was admittedly passed. Such an intention is sufficient to reject the petition filed under Order 21 Rule 58. In the present case, the first respondent filed a claim petition under Order 21 Rule 58 and the Trial Court has rightly considered the facts and circumstances and dismissed the claim petition.

20. The first Appellate Court erroneously appreciated the facts and allowed the claim petition merely on the ground that the undertaking given by the second respondent before the Court in respect of the suit property is not binding and cannot be construed as a charge. Such a finding, certainly caused injustice to the appellant. As a decree holder, he is unable to realize the fruits of the decree due to the collusion between

the respondents. The entire facts and circumstances are sufficient to arrive a conclusion that the respondents colluded each other and executed the sale in order to defeat the decree and even during the pendency of E.A proceedings or during the pendency of C.M.A., the respondents had not taken any steps to repay the borrowed amount to the appellant. Thus, the intention of the respondents are also made clear.

21. Thus, this Court has no hesitation in arriving a conclusion the judgment and decree passed in C.M.A.No.10 of 2003, dated 15.11.2005, is perverse and not in consonance with the established principles of law. Accordingly, the said judgment and decree stands set aside. The judgment and decree dated 10.01.2003 passed in E.A.No.442 of 2001 in E.P.No.76 of 2000 in O.S.No.8072 of 1995 is confirmed. Consequently, C.M.S.A.No.26 of 2007 stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

gsk

To

- 1.The Principal District Judge, Chengalpet.
- 2.The Subordinate Judge, Poonamallee.

+1 cc to M/s.T.V.Krishnamachari, Advocate Sr.No. 9961

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C.M.S.A.No.26 of 2007 and
M.P.No.1 of 2007

CP (CO)

RMP (09/04/2021)

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