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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.02.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

C.M.S.A.No.51 of 2011

Subramanian

.. Appellant/Appellant

Versus

1.Bomma Naicker

2.Thangavel @ Thangamuthu @ Machi

.. Respondents/Respondents

Prayer: Civil Miscellaneous Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 19.10.2010 made in C.M.A.No.3 of 2010 on the file of the Sub Court, Perundurai confirming the fair and decretal order dated 16.12.2005 made in E.A.No.184 of 2004 in E.P.No.117 of 2004 in O.S.No.594 of 1999 on the file of the District Munsif cum-Judicial Magistrate, Perundurai.

For Appellant : Mr. N. Manoharan

For Respondents : Mr. A. Thiyagarajan, for R1
No Appearance for R2

J U D G M E N T

The judgment and decree dated 19.10.2010, passed in C.M.A.No.3/2010, confirming the fair and decretal order dated 16.12.2005, passed in E.A.No.184/2004, is under challenge in the present Civil Miscellaneous Second Appeal. The substantial question of law raised in the present appeal is that whether the Courts below erred in law in rejecting the claim petition by counting the genuineness of the registered sale deed, dated 30.08.2001. Particularly, when there was no communication to the Sub Registrar as contemplated under Order 38 Rule 11 B CPC, so as to invalidate the transfer.

2. The facts in the nutshell to be considered in this appeal are that, the first respondent filed O.S.No.594/1999, against the second respondent for recovery of money, during the year 1999, suit was decreed ex-parte. On 01.06.2000, registered sale agreement was executed by the second respondent to the appellant to sell his property. Thereafter, E.P.No.117/2004, was filed and the property was attached by the Court on



26.06.2000. The contention of the appellant is that after attachment of the property in E.P.No.117/2004, the appellant got the registered sale deed on 30.08.2001. Thus, the appellant filed E.A.No.184/2004 under Order 21 Rule 58 CPC on 03.10.2001. Accordingly, on 04.10.2001, the property was sold in Court auction without notice to the appellant. The appellant filed E.A.No.184/2004 which was dismissed by the Execution Court on 16.12.2005, mainly on the ground that the property was already attached on 26.06.2000 whereas, the sale deed was executed on 30.10.2001 to the appellant. Accordingly, the sale was confirmed in E.P.No.117/2004 on 03.12.2007. Consequently, the delivery was effected on 05.06.2008 in E.A.No.117/2004. The appellant filed C.M.A.No.3/2010 before the Sub Court, Perundurai and the said CMA was also dismissed on the ground that the appellant had purchased the property after the order of attachment and the appellant is not a bonafide purchaser and further, the appellant had purchased RS.No.138/1, but the properties sold in the auction is located in R.S.No.158/1.

3. This Court is of the considered opinion that the relevant fact regarding the registered sale deed dated 30.08.2001 was adjudicated and a finding was made by the Sub Court, Pe..in C.M.A.No.3/2010 more specifically in para 7 reads as under:-

"7. It is to be noted that during the cross examination of P.W.1 he would admit that he knew the loan transaction between the Bommanaicker and Thangamuthu. Further he admits that he obtained the sale deed nearly after one year from the date of attachment. Further he would admit that the Power of attorney Mayilathal is non other than his wife. Further he would also admit that he has not paid any money to the said Mayilathal at the time of Ex.P.1 sale deed, but in the Ex.P.1 sale deed it is recited that the said Mayilathal being the Power of attorney of one Thangamuthu who is the judgment debtor, receive th sum of Rs.30,000/- as sale consideration. But in the cross examination, P.W.1 admitted that he has not paid any money to the Mayilathal. Therefore frome this admission it is quite clear that there was no sale consideration passed in the Ex.P.1 sale deed and it is only a sham and nominal deed. Under these circumstances the appellant should have examined any one of the attesting witnesses to prove that he is a bonafide purchaser and he purchased the properties for a valuable consideration. But the appellant has not at all examined any other witnesses to prove his case."



4. The factum regarding the registration of the sale deed was admittedly done after the attachment of the property in E.P.No.117/2004 on 26.06.2000, then the learned Sub Judge, categorically recorded the factum that the registered sale deed was executed after attachment of the property, then Section 53 of the Transfer of Property would be applicable and accordingly, the said Transfer of Property is to be construed as transfer.

5. In view of the fact that the property was already attached by the Court in an execution proceedings. Any sale transaction done after the attachment by the Court, such transaction if it is found to be defect the claim of the decree holder then such transaction sought to be declared as fraudulent transfer within the meaning of Section 53 of Transfer of Property Act. Thus, the substantial question of law raised in this regard affirm in favour of the appellant. The facts are recorded by the Sub Court, accordingly the registration of the sale deed which is crystal clear. The registered sale deed was executed well after the attachment of the property in E.P.No.117/2004 and therefore, the sale deed was registered to fructify the rights of the judgment debtor. Thus, the said sale is fraudulent transfer within the meaning of Section 53 of the Transfer of Property Act. Accordingly, the judgment and decree dated 19.10.2010, passed in CMA.No.3/2010 confirming the fair and decretal order dated 16.12.2005 passed in E.A.No.184/2004 stands confirmed. Consequently, CMSA.No.51/2011 stands dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

AT

To

1.The Subordinate Judge,
Perundurai.

2.The District Munsif-cum-Judicial Magistrate,
Judicial Magistrate Court, Perundurai.

+1cc to Mr.N.Manokaran, Advocate Sr No.6443

C.M.S.A.No.51 of 2011

BR (CO)
PR (08/09/2021)