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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.11.2020

DATE OF DECISION : 26.04.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A.No.30 of 2019

Annakkili
W/o Ayyanar

.. Appellant/ Appellant /Claimant

-vs-

1. Murugan
S/o Govindan
2. Ramamoorthy
S/o Kuppusamy

.. Respondent/Judgment debtor

Memorandum of Grounds of Civil Miscellaneous Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 5.4.2019 made in A.S.No.17 of 2017 on the file of Principal Sub Judge, Villupuram, confirming the judgment and decree dated 20.7.2017 made in E.A.No.387 of 2013 in E.P.No.132 of 2010 in O.S.No.226 of 2009 on the file of Principal District Munsif, Tirukoilur.

For Appellant :: Mr.N.Suresh

For Respondents :: Mr.K.Gangadaran for R1
No appearance for R2

JUDGMENT

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

2. This civil miscellaneous appeal has been directed against the judgment and decree passed by the learned Principal Sub Judge, Villupuram in A.S.No.17 of 2017 dated 5.4.2019, dismissing the appeal preferred by the appellant and confirming the judgment and decree passed by the learned Principal District Munsif, Tirukoilur in E.A.No.387 of 2013 in E.P.No.132 of 2010 in O.S.No.226 of 2009 dated 20.7.2017, raising the following substantial questions of law:-



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"(i) Whether the Courts below have committed manifest error in dismissing the claim petition insofar as item No.1 is concerned as there was no attachment on 8.10.2009 when the property was sold by the second respondent in favour of appellant?

(ii) Whether the Courts below have erred in not giving a finding regarding the patent collusion between the second respondent and the decree holder especially when the second respondent had deposed on the side of the decree holder before the Court below?

(iii) Whether the Courts below have erred in dismissing the claim petition on the ground of fraudulent transaction, when admittedly there are no plurality of creditors to avail the ground of fraudulent transaction under Section 53 of the Transfer of Property Act?

(iv) Whether the Courts below have erred in dismissing the claim petition when admittedly it has been held by the Courts below that the second respondent has admittedly not taken any steps to challenge the sale deed in favour of the petitioner/appellant?

(v) Whether the Courts below have erred in dismissing the claim petition when admittedly on the date of attachment on 11.5.2012 the property was already sold three years before to the petitioner/appellant by the second respondent?"

3. Mr.N.Suresh, learned counsel appearing for the appellant submitted that the appellant herein is the third party purchaser of the suit properties. When the first respondent-Murugan filed the suit in O.S.No.226 of 2009 on 29.9.2009 for recovery of a sum of Rs.60,000/-, based on the pro-note executed by the second respondent-Ramamoorthy, he moved I.A.No.1513 of 2009 for attachment of the petition properties before judgment. Along with the said application, he also moved a third party affidavit stating that the second respondent-Ramamoorthy has been trying to alienate the petition properties to the appellant-Annakkili, W/o Ayyanar. In view thereof, the first respondent sought for a direction to be given to the judgment debtor-Ramamoorthy to furnish security for the suit claim of Rs.83,868/-, failing which the petition properties shall be attached. At request of the second respondent's counsel, the said I.A.No.1513 of 2009 was adjourned to 26.11.2009 for filing of counter affidavit. In the meanwhile, before any order of attachment was passed, the appellant purchased the second item of the petition property on 30.7.2009 from the second respondent and pursuant thereto, she



also started enjoying the second item of property and other properties and also obtained patta no.804 in her name. Even the first item of petition property and other properties were also sold by the second respondent along with his father Kuppusamy for a sale consideration of Rs.26,000/- and there is a recital in the said document that the second respondent has to pay a sum of Rs.26,000/- towards the loan borrowed from one K.Murugan of Vadivanguppam, out of which the appellant had agreed to pay a sum of Rs.25,000/- and the balance Rs.1,000/- alone was paid to the second respondent and as per the sale deed, the petition properties were enjoyed and possessed by the appellant after obtaining patta no.804 in her name.

4. Mr.N.Suresh, learned counsel appearing for the appellant submitted that the first item of the petition property was sold to the appellant by the second respondent and his father under Ex.P3 dated 8.10.2009. Only thereafter, the collusive suit filed by the first respondent against the second respondent was allowed to be decreed ex parte on 10.3.2010, on which date the I.A.No.1513 of 2009 was closed and no attachment order was passed. After 2½ years, order of attachment in E.P.No.132 of 2010 in O.S.No.226 of 2009 was passed on 11.5.2012 by the trial Court. Therefore, on the date of ex parte decree passed by the trial Court on 10.3.2010, the suit property was not available with the judgment debtor. Secondly, even on the date of order of attachment dated 11.5.2012 passed in E.P.No.132 of 2010 in O.S.No.226 of 2009, the suit property was not available in the hands of the judgment debtor. Therefore, the doctrine of lis pendens by virtue of Sections 52 & 53 of the Transfer of Property Act cannot be applied to the suit properties. Taking support from Section 64 of the Code of Civil Procedure, Mr.Suresh further argued that when an attachment order is passed, any private transfer of the property shall be void as against all claims enforceable under the attachment. But in the present case, when the first item of the suit property was sold to the appellant on 8.10.2009 itself, whereas the suit was decreed ex parte on 10.3.2010 and the order of attachment was passed only on 11.5.2012, by virtue of Section 64 of the Code of Civil Procedure, the impugned decretal orders passed by the Courts below are unsustainable in law and they are liable to be set aside. Again referring to Section 52 of the Transfer of Property Act, he has pleaded that in the present case, the first respondent filed the suit for recovery of money, therefore, the doctrine of lis pendens contemplated under Section 52 of the Transfer of Property Act, cannot be pressed into service. In support of his submissions, he has relied upon a judgment of this Court in the case of Chellappa v. J.Jagadeesa Chettiar and others, CDJ 2007 MHC 011, wherein it is held that Section 52 of the Transfer of Property Act will not apply to a simple money suit in which the right to immovable property was not directly



and specifically in question. Therefore, what is important is that the suit should be pending and in a pending suit, an immovable property, if transferred, in which any right to immovable property is directly or specifically in question, only in that event, Section 52 of the Transfer of Property Act will come into operation. For the same proposition, another judgment in the case of Ammavasai v. Tulasikannu and another, CDJ 2017 MHC 4321 has been cited by the learned counsel appearing for the appellant. Again Mr.Suresh has referred to the judgment of the Apex Court in Vidur Impex & Traders Pvt.Ltd., & others v. Tosh Apartments Pvt.Ltd.,& Others, CDJ 2012 SC 560 for the proposition that the litigation must be one in which right to immovable property is directly and specifically in question.

5. Mr.K.Gangadaran, learned counsel appearing for the first respondent/decreed holder, opposing the above contentions, submitted that when the first respondent/decreed holder filed the money suit in O.S.No.226 of 2009 on 29.9.2009 for recovery of a sum of Rs.60,000/- based on the pro-note executed by the second respondent on 1.10.2007, he has also moved I.A.No.1513 of 2009 seeking attachment of the properties before judgment. Along with the said I.A., the decreed holder also filed a third party affidavit stating that the second respondent has been trying to alienate the properties in favour of his brother's wife Annakkili, the appellant herein and sought for a direction to the judgment debtor to furnish security for the suit claim of Rs.83,868/-, failing which the petition properties shall be attached. Based on the request made by the second respondent's counsel, the said I.A., was adjourned to 26.11.2009 for filing counter affidavit. Again the said matter was adjourned to 1.12.2009. On 1.12.2009, the second respondent/judgment debtor filed the counter affidavit. Since the second respondent, in order to defeat the lawful claim of the first respondent, with a mala fide intention after filing the suit based on the pro-note executed in favour of the first respondent, sold away the first item of property and other properties to his brother's wife which is a sham and nominal transaction in order to escape from the liability of Rs.60,000/- payable to the first respondent and also executed a sale deed on 8.10.2009. Moreover, when the second respondent and the appellant colluding with each other alienated the suit property during the pendency of the suit, the principle of lis pendens would apply. Therefore, the arguments advanced by the learned counsel appearing for the appellant, who is not a bona fide purchaser of the suit property, that the sale of the suit property took place on 8.10.2009, much prior to the order of attachment dated 11.5.2012, is without any merit. The reason being that the suit itself was decreed ex parte on 10.3.2010. It has to be borne in mind that the suit was filed on 29.9.2009 by the first respondent praying for a money decree against the second respondent. The first respondent also moved



I.A.No.1513 of 2009 seeking an order of attachment of the suit properties before judgment, therefore, Sections 52 & 53 of the Transfer of Property Act will apply, for the simple reason that if the transfer of immovable property made with intent to delay or defeat the creditors of the transferor shall be voidable at the option of any creditor so defeated, the doctrine of lis pendens by virtue of Section 52 of the Transfer of Property Act will apply.

6. I also find merits on the submissions made by the learned counsel appearing for the first respondent/decreed holder. When the second respondent/judgment debtor had borrowed a sum of Rs.60,000/- and executed a pro-note in favour of the first respondent promising to pay the entire amount with interest at the rate of 12% per annum, he failed to repay the same. Therefore, the first respondent filed the suit in O.S.No.226 of 2009 on 29.9.2009 based on the pro-note dated 1.10.2007. It is not in dispute that the suit was filed on 29.9.2009 seeking a money decree for a sum of Rs.60,000/- against the second respondent/judgment debtor. Along with the said suit, I.A.No.1513 of 2009 also has been filed seeking an order of attachment of the properties before judgment with a third party affidavit stating that the second respondent has been trying to alienate the suit properties to the appellant-Annakkili. Therefore, on the date of filing of the suit on 29.9.2009 and I.A.No.1513 of 2009, on the very same date, both the second respondent/judgment debtor and the appellant/subsequent purchaser have acted in collusion to defeat the claim made in the very suit itself. When Sections 52 & 53 of the Transfer of Property Act are explicit and conspicuously speak about the conduct of the judgment debtor and the subsequent purchaser, inasmuch as when they have acted in unison to defeat the interest of the plaintiff/decreed holder and the consequential order to be passed by the civil Court, the doctrine of lis pendens will come into operation.

7. One of the arguments advanced by Mr.Suresh was that Sections 52 & 53 of the Transfer of Property Act cannot be invoked in a simple money suit, as the suit is only for recovery of money and is not involved with any right of immovable property. This innocuous argument can be demonstrated as illogic and highly unjustified. The principles underlying Sections 52 & 53 are based on justice and equity. For instance, A and B are close friends. A wanted to help his friend B to purchase a mini shopping complex so that B can eke out his livelihood once the revenue generates from the business done in the shopping complex. For this purpose, B has executed a pro-note for having borrowed a sum of Rs.10 lakhs. On the very same day, B has purchased the shopping complex, in which A's vendor also appended his signature as a witness to the sale deed. After



sometime, if B fails to repay the money, in the event of filing a suit by A-lender against B-borrower for recovery of money and simultaneously moving an application along with the suit seeking attachment of the property before judgment, on the premise that B has been trying to alienate the property by using the loan amount borrowed from the plaintiff, the argument that Section 52 contemplating the doctrine of lis pendens will not apply to the pendency of the money suit, is highly inappropriate. In this context only, the Supreme Court in the case of Vidur Impex & Traders Pvt.Ltd., & others v. Tosh Apartments Pvt.Ltd., & Others, CDJ 2012 SC 560 has clearly ruled that the transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest during the pendency of the suit will be subject to the decision in the suit. The reason being that the operation of bar under Section 52 is subject to the power of the Court to exempt the suit property from the operation of Section 52. The relevant paragraph of the said judgment reads as follows:-

"34. In Sarvinder Singh v. Dalip Singh, (1996) 5 SCC 539, this Court considered the question whether the respondent who purchased the property during the pendency of a suit for declaration filed by the appellant on the basis of the registered Will executed by his mother is entitled to be impleaded as party and observed:

"The respondents indisputably cannot challenge the legality or the validity of the Will executed and registered by Hira Devi on 26-5-1952. Though it may be open to the legal heirs of Rajender Kaur, who was a party to the earlier suit, to resist the claim on any legally available or tenable grounds, those grounds are not available to the respondents. Under those circumstances, the respondents cannot, by any stretch of imagination, be said to be either necessary or proper parties to the suit. A necessary party is one whose presence is absolutely necessary and without whose presence the issue cannot effectually and completely be adjudicated upon and decided between the parties. A proper party is one whose presence would be necessary to effectually and completely adjudicate upon the disputes. In either case the



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respondents cannot be said to be either necessary or proper parties to the suit in which the primary relief was found on the basis of the registered Will executed by the appellant's mother, Smt Hira Devi. Moreover, admittedly the respondents claimed right, title and interest pursuant to the registered sale deeds said to have been executed by the defendants-heirs of Rajender Kaur on 2-12-1991 and 12-12-1991, pending suit.

Section 52 of the Transfer of Property Act envisages that:

"During the pendency in any court having authority within the limits of India ... of any suit or proceeding 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 the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."

It would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the court. Admittedly, the authority or order of the court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of Section 52. Under these circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit." (emphasis supplied)

8. In the light of the above, when the judgment debtor had not obtained the order or leave of the Court for alienation of



the suit properties, the alienation that took place by way of sale deed made by the judgment debtor in favour of the appellant on 8.10.2009 is clearly hit by the doctrine of lis pendens, as per Sections 52 & 53 of the Transfer of Property Act. Moreover, when the said provisions do not say that they cannot be applied to a money suit, the interpretation made by Mr.Suresh, learned counsel appearing for the appellant is unacceptable, for the simple reason that the said provisions cannot be read in isolation and have to be read jointly, as Section 53 protects the rights of the creditors. In this context, Sections 52 & 53 of the Transfer of Property Act are extracted as follows:-

"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



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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."

9. A close reading of the Explanation given under Section 52 makes it abundantly clear and comes to the aid of the first respondent/decreed holder that for the purposes of this section, 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. As highlighted above, when the plaintiff/decreed holder had filed the suit and also the I.A.No.1513 of 2009 on 29.9.2009, it goes without saying that the interest on the immovable property was directly and specifically in question, therefore, the suit properties ought not to have been sold in favour of the appellant on 8.10.2009, who is the brother's wife of the second respondent/judgment debtor.

10. Further, Section 52 does not say that the doctrine of lis pendens will not apply to any money suit, because this section cannot say so, since the Explanation given in Section 52 is conspicuous and explicit that for the purpose of this section, 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 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. Therefore the true intent of Section 52 with Explanation is vividly clear that the Defendant or Judgment Debtor cannot transfer the suit property from the date of initiation of proceeding for attachment before judgment in a pending money suit and moreover, till the execution proceeding of decree or order obtained is completely satisfied or discharged, the mischief of Section 52 with Explanation and Section 53 will operate against the Defendant, irrespective of the fact whether it is a money suit or suit for immovable property, inasmuch as Section 52 with Explanation does not bar application of the principle of lis pendens to money suit. Law maker of the Transfer of Property Act were careful enough to mention in the Explanation 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, namely, filing of an Interlocutory Application for Attachment Before Judgment. Moreover, if Section 52 is excluded to money suit, then the money decree obtained after a long contest from a Court of competent jurisdiction will become meaningless, if there is no property available for execution of money decree, as a result, the decree holder of money suit will go remediless. In these facts and circumstances, as the judgments cited by the learned counsel for the appellant in Chellappa and Ammavasai cases ignored Section 52 and its Explanation, they are per incuriam in law. Useful reference can be had from the judgment of the Apex Court in State of M.P. v. Naramada Bachao Andolan & another, (2011) 7 SCC 639, wherein the Hon'ble Apex Court has observed as follows:-

"67. Thus, "per incuriam" are those decisions given in ignorance or forgetfulness of some statutory provision or authority binding on the Court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.

69. The Courts are not to perpetuate an illegality, rather it is the duty of the courts to rectify mistakes. While dealing with a similar issue, this Court in Hotel Balaji v. State of A.P. (1993) Supp (4) SCC 536 observed as under:

"12....'2...To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this we derive comfort and strength from the wise and



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inspiring words of Justice Bronson in
Pierce v. Delameter (1 NY 3 (1847) AMY. at
page 18:

"a Judge ought to be wise
enough to know that he is fallible
and therefore ever ready to learn:
great and honest enough to discard
all mere pride of opinion and
follow truth wherever it may lead:
and courageous enough to
acknowledge his errors".

11. Moreover, neither of the above judgments expressed the views on the Explanation to Section 52 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 nor had any reference to the Explanation which is directly dealing with the crucial issue, therefore, it is not having any binding effect, hence, I am afraid to apply either of the decision to the present case.

12. For all the aforementioned reasons, this Court, answering the substantial questions of law against the appellant, dismisses the civil miscellaneous second appeal, confirming the judgments and decrees passed by the Courts below. Consequently, C.M.P.No.21261 of 2019 is also dismissed. No costs.

Sd/-
Assistant Registrar(CS I)

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Sub Assistant Registrar

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To

1. The Principal Subordinate Judge
Villupuram

2. The Principal District Munsif
Tirukoilur.

Copy to:

The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.K.Gangadaran, Advocate SR.No. 25488

C.M.S.A.No.30 of 2019

BS (CO)

A.SK(29.09.2021)