BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 01.12.2021

Delivered on : 23.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
and
THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.A.(MD)Nos.360 and 361 of 2012
and
M.P.(MD)Nos.1 and 1 of 2012

C.M.A.(MD)No.360 of 2012:-

K.Thirumalaivadivu ... Appellant/2nd Respondent/ Plaintiff

-vs-

1.S.Rajasekaran ... 1st Respondent/ 1st Respondent/ Defendant

2.S.Baskaran ... 2nd Respondent/Petitioner/ 3rd Party

PRAYER: Civil Miscellaneous Appeal filed under Order XXI Rule 58(4) of C.P.C., to set aside the order dated 25.01.2011, passed in I.A.No.381 of 2010 in O.S.No.47 of 2010, on the file of the Principal District Court, Virudhunagar District at Srivilliputhur.

For Appellant : Mr.AR.L.Sundaresan
Senior Counsel
for Mr.N.Tamilmani

For Respondent No.1 : Mr.H.Lakshmi Shankar

For Respondent No.2 : Mr.Srinivasa Raghavan
for Mr.Kirubakaran

C.M.A.(MD)No.361 of 2012:-

Gandhi, S/o.R.S.Somasundaram ... Appellant/2nd Respondent/ Plaintiff

-vs-

1.S.Rajasekaran ... 1st Respondent/ 1st Respondent/ Defendant

2.S.Baskaran ... 2nd Respondent/Petitioner/ 3rd Party

PRAYER: Civil Miscellaneous Appeal filed under Order XXI Rule 58(4) of C.P.C., to set aside the order dated 25.01.2011, passed in I.A.No.380 of 2010 in O.S.No.46 of 2010, on the file of the Principal District Court, Virudhunagar District at Srivilliputhur.

For Appellant : Mr.AR.L.Sundaresan Senior Counsel for Mr.N.Tamilmani

For Respondent No.1 : Mr.H.Lakshmi Shankar

For Respondent No.2 : Mr.Srinivasa Raghavan for Mr.Kirubakaran

COMMON JUDGMENT

(Judgment of the Court was made by DR.G.JAYACHANDRAN, J.)

These Civil Miscellaneous Appeals are directed against the order passed by the trial Court in the Interlocutory Applications filed by the third party [second respondent in both the appeals], to raise attachment before judgment and succeeded.

2.The brief facts common to both the appeals are as follows:-

(i) One Rajasekaran, who is the first respondent in both the appeals alleged to have borrowed a sum of Rs.25,00,000/- on 16.04.2008 from one R.S.Gandhi, the plaintiff in O.S.No.46 of 2010. He has not repaid the loan amount, despite promise to pay the same with interest on demand, on executing a Pro-note. After issuance of the pre-suit notice, the suit in O.S.No.46 of 2010, for recovery of Rs.31,10,833/- was filed before the Principal District Court, Virudhunagar District at Srivilliputhur.

(ii) Similar suit was instituted against Rajasekaran by K.Thirumalaivadivu, W/o.R.S.Gandhi, in O.S.No.47 of 2010, on the file of the Principal District Court, Virudhunagar at Srivilliputhur, alleging that he borrowed a sum of Rs.20,00,000/- on 22.05.2008 and promised to repay it with interest at Rs.1/- per Rs.100/- per month. Despite execution of the pro-note for the money borrowed, he failed to repay the money and therefore, suit for recovery of Rs.24,64,666/- filed after issuance of pre-suit notice.

(iii) In both the suits, the respective plaintiffs have taken out the interlocutory applications *viz.*, I.A.No.125 of 2010 in

O.S.No.46 of 2010 and I.A.No.126 of 2010 in O.S.No.47 of 2010, for attachment before judgment of the house property of the defendant Rajasekaran [first respondent]. These applications for attachment before judgment on the first day of hearing, *i.e.*, 30.04.2010 was considered by the trial Court and the respondent Rajasekaran was directed to furnish security for a sum of Rs.45,00,000/- on or before 08.06.2010, failing which, attachment by 08.06.2010. The first respondent after receiving the summons in the suit and notice in the attachment before judgment applications, did not appear before the Court either in person or through the counsel. Hence, the trial Court allowed the applications on 08.06.2010 and made the attachment absolute on 25.06.2010.

(iv) While so, S.Baskaran, the second respondent herein has filed third party applications *viz.*, I.A.No.380 of 2010 in O.S.No.46 of 2010 and I.A.No.381 of 2010 in O.S.No.47 of 2010 under Order 38 Rule 8 and Order 21 Rule 58 of C.P.C., to adjudicate his claim and title over the petition mentioned property and raise the attachment.

(v) The affidavit of S.Baskaran filed in support of these applications states that the said Baskaran, the third party/petitioner and Rajasekaran, the defendant in both the suits [first respondent] are carrying on Hardware Business in Rajapalayam. In view of their business and family relationship, goods worth Rs.37,50,000/- was supplied to Rajasekaran on credit basis on various dates. When the third party/ petitioner Baskaran approached Rajasekaran to clear the dues, he delayed the payment and later agreed to sell his residential property, which is the subject matter of the present application.

(vi) Pursuant to the said promise, a sale agreement was entered between them on 10.07.2009 before the Notary Public, Srivilliputhur. As per the sale agreement, Rajasekaran agreed to clear the Bank loans and assured to hand over the scheduled property without any encumbrance. Believing his words, the third party/petitioner waited for a period of two months. Rajasekaran requested to pay Rs.5,00,000/- to the Bank and assured to execute the sale deed as promised earlier and also will re-pay Rs.5,00,000/-. Therefore, he agreed to pay the remaining Rs.30,00,000/- and received the original documents from the Bank. The same was reduced into writing in the presence of the Bank Manager. Subsequently, Rajasekaran failed to execute the sale deed and tried to sell the property to the third parties, hence, a suit in O.S.No.87 of 2010 for injunction before the District Munsif Court, Srivilliputhur, was filed. Soon thereafter, Rajasekaran realized his mistake and approached S.Baskaran expressing his willingness to execute the sale deed in favour of S.Baskaran. Accordingly, on 03.05.2010, sale deed was registered before the Sub-Registrar, Rajapalayam and possession of the house property was handed over to S.Baskaran.

(vii) From the sale consideration, Rajasekaran has cleared his encumbrance in the Bank. Being a *bona fide* purchaser for value, even though there was pending application for attachment, the order attachment before judgment dated 08.06.2010 was subsequent to the transfer of property in his favour, therefore, the attachment has to be raised.

(viii) The said petitions filed by the third party/second respondent herein to raise attachment was contested by the plaintiff in both the suits.

(ix) The trial Court formulated the following issues for consideration:-

> ''(1) Whether application filed by 3rd party claimant under Order 38 Rule 8 of C.P.C. to raise the attachment ordered by this Court on 08.06.2010 in respect of schedule property is maintainable?
>
> (2) Whether sale deed dated 03.05.2010 is sham and nominal document collusively came into existence on the understanding between third party claimant and the first respondent?
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> (3) Whether sale deed dated 03.05.2010 said to have been executed by the first respondent in favour of third party claimant is a fraudulent transaction and hit by Section 52 of the Transfer of Property Act?
>
> (4) Whether sale deed dated 03.05.2010 said to have been executed by the first respondent in favour of third party claimant is hit by doctrine of *lis pendens* under Section 52 of the Transfer of Property Act?
>
> (5) Whether third party claimant has got absolute right and title over the schedule property and accordingly, he is entitled to get the attachment ordered by this Court in respect of schedule property on 08.06.2010 raised?
>
> (6) To what relief if any is third party claimant entitled to?''

(x) On considering the deposition of the third party/second respondent herein and four exhibits relied by the third party/petitioner and the copy of the plaint in O.S.No.402 of 2008, on the file of the Principal District Munsif Court, Srivilliputhur, relied and marked by the first respondent/defendant, the trial Court allowed the third party applications and declared that the third party/S.Baskaran is the absolute owner of the scheduled property, accordingly, attachment before judgment ordered by the trial Court on 08.06.2010 was raised and the property was released from attachment.

3.Being aggrieved by the said orders, these civil miscellaneous appeals are preferred.

4.The learned Senior Counsel for the appellants would submit that the trial Court miserably failed to consider the fraudulent transaction and documents created by the defendant/first respondent herein in connivance with the third party/petitioner to circumvent the lawful order of attachment and to defeat the right over the claim of the appellants in their money suit. The very reading of the affidavit filed in support of the petitions by the third party/second respondent herein would expose his fraudulent conduct. Particularly, the averments regarding the payment of sale consideration, on the reading of the affidavit and sale deed would show that the said transfer of property is a fraudulent and collusive deed. The plaint averments in the bare injunction suit filed by the third party/second respondent herein against the defendant/first respondent herein in respect of the same property, but even before withdrawal of the suit, creating sale deed after affixture of the injunction notice in the property is suffice to hold that the alleged sale deed in favour of the third party/second respondent herein is sham and nominal deed.

5.The trial Court though framed a issue regarding the genuineness of the transaction, has not considered the material placed by the appellants as well as the self-contradictory evidence placed by the third party/second respondent herein. The trial Court ought to have dismissed the petitions to raise attachment filed by the third party/second respondent herein on the sole ground that he has not produced any document to show that there was an existing transaction between him and the defendant/first respondent herein and in the said transaction, the defendant/first respondent herein owe him Rs.37,50,000/-. Even without a piece of document to substantiate and prove the said averment, the trial Court had proceeded to accept the case of the third party/second respondent herein as if he is a *bona fide* purchaser for valuable sale consideration and therefore, despite the order of attachment by the Court, the transfer of property in his name by the defendant/first respondent herein erroneously is held to be valid. The fraudulent intention of the defendant/first respondent herein and the third party/second respondent herein could be palpably seen from the conduct of creating document after receipt of pre-suit notice and affixture of attachment notice. In the absence of proof for production of acceptable document for payment of sale consideration, the trial Court ought to have dismissed the third party petitions for raising attachment. Contrarily, the trial Court has erroneously held that the third party/second respondent herein is a *bona fide* purchaser and has paid the consideration to the vendor/defendant [first respondent].

6.The learned counsel appearing for the third party purchaser, who is the second respondent in these appeals, would submit that the property was attached only on 08.06.2010. Whereas, the sale of the property under Ex.P.3 got completed and registered on 03.05.2010 itself. Prior to the execution of the sale deed, the second respondent based on the sale agreement, apprehending that the first respondent may alienate the property during the subsistence of sale agreement, approached the Civil Court for injunction in O.S.No.87 of 2010 as early as 21.06.2010 and obtained interim injunction. Therefore, the *bona fide* of the third party purchaser pending litigation cannot be doubted.

7.The Hon'ble Supreme Court in **Vannarakkal Kallalathil Sreedharan Vs. Chandramaath Balakrishnan and another** reported in **1990 (3) SCC 291**, while considering Order 38 Rule 10 of C.P.C., has held as follows:-

> *''7.Hence under a contract of sale entered into before attachment the conveyance after attachment in pursuance of the contract passes on good title in spite of the attachment. To the same effect are the decisions of the Bombay High Court in Rango Ramachandra Kulkarni v. Gurlingappa Chinnappa Muthal [AIR 1941 Bom 198 : 43 BLR 206] and Yeshvant Shankar Dunakhe v. Pyaraji Nurji Tamboli [AIR 1943 Bom 145 : 45 BLR 208] . The High Court of Travancore-Cochin in Kochuponchi Varughese v. Ouseph Lonan [AIR 1952 TC 467 : ILR 1952 TC 201] has also adopted the same reasoning.*
>
> *8. The Punjab & Haryana High Court, however, has taken a contrary view in Mohinder Singh v. Nanak Singh [AIR 1971 P & H 381 : 73 Punj LR 257] . It has been held that a sale in pursuance of a pre-attachment agreement is a private alienation of property and must be regarded as void against the claim of the attaching creditor. In support of this proposition, Section 64 of the Code of Civil Procedure was relied upon which according to the High Court was intended to protect the attaching creditor against private alienation. This was also the observation of the Lahore High Court in Buta Ram v. Sayyad Mohammad [AIR 1935 Lah 71 : 16 Lah 328] .*
>
> *9. In our opinion, the view taken by the High Courts of Madras, Bombay, Calcutta and Travancore-Cochin in the aforesaid cases appears to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Section 64 CPC no doubt was intended to protect the attaching creditor, but if the subsequent conveyance is in*

> *pursuance of an agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. We cannot, therefore, agree with the view taken by the Punjab and Haryana High Court in Mohinder Singh case [AIR 1971 P & H 381 : 73 Punj LR 257] .''*

Therefore, the learned counsel for the second respondent stated that it is now settled proposition of law that attachment before judgment cannot be free from the obligation incorporated under the contract for sale.

8.Per contra, the learned Senior Counsel for the appellants would submit that the said principle of law will apply only to *bona fide* purchaser and genuine transaction, but not to fraudulent transaction. Section 52 of the Transfer of Property Act deals with fraudulent transaction and Section 53 of the Transfer of Property Act deals with transaction *pendente lite*. Any transfer of property done fraudulently to be tested under Section 53 of the Transfer of Property Act. In the present case, the trial Court has miserably failed to test the transaction in the light of Section 53 of the Transfer of Property Act, although specific issue framed to that effect. The deliberate omission by the trial Court not answering the said issue will expose the perversity in the said order.

9.The issue in the instant case centers around the validity of the transfer of property, which was attached before judgment in a money suit. Contemplating such eventualities, Sections 52 and 53 of the Transfer of Property Act specifically deals about transfer of property pending suit and fraudulent transfers. On a plain reading of these two provisions, one can understand that there shall be no bar for transferring the property pending suit, provided, such transfer is not a collusive transfer to affect the right of any other party under any decree or order. Also, such transfer should not be with intention to defeat or delay the creditors of the transferor. If any private alienation of the property is made after the attachment, such transfer shall be void. Whereas as per Section 64 of C.P.C., any alienation of the property after attachment is void. Section 53 of the Transfer of Property Act, would say that the fraudulent transfer intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Order 38 Rule 11-A of C.P.C., says that provisions of the Code applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgment. Order 38 Rule 10 of C.P.C. specifically declares that any attachment before judgment shall not affect the rights of strangers existing prior to the attachment. While Order 21 Rule 58 of C.P.C. empowers the Court to adjudicate the claim or any objection in respect of attachment of property in execution of a decree, including the questions relating to right, title or interest in the property attached. Order 38 Rule 8 of C.P.C., mandates that such claim shall be adjudicated upon in the manner provided for the adjudication of claims to property attached in execution of a decree for the payment of money.

10.The above provisions of law under the Transfer of Property Act as well as the Code of Civil Procedure indicates that attachment before judgment pursuant to the Interlocutory Application filed by the plaintiff in a money suit and the plea of the third party/second respondent herein to adjudicate the title and raise the attachment, falls well within the parameters prescribed under law as mentioned as above.

11.Now, the point for determination is whether the transfer of subject property *pendente lite* to the second respondent herein by the first respondent after receipt of pre-suit notice, after issuance of summons in the suit and after issuance of notice in the attachment before judgment application, can be construed as a *bona fide* transfer, not tainted with the act of collusion and fraud.

12.When the second respondent has claimed himself a *bona fide* purchaser to declare his title and raise the attachment, it is his bounden duty to prove his *bona fide*. In a transfer of property for consideration, the *bona fide* can be proved by passing of consideration and the said consideration was proportionate to the value of the property. The sale deed (Ex.P3), upon which, the second respondent claims title over the property as *bona fide* purchaser, is dated 03.05.2010. The sale consideration for the said transaction is shown as Rs.43,00,000/-. In the sale deed, recital receipts annexed to the deed is referred to show the mode of payment. In the affidavit of the third party/second respondent herein filed in support of raising attachment and to ascertain the title, it is pleaded that the defendant Rajasekaran [first respondent] owe the third party/second respondent herein a sum of Rs.37,50,000/- towards supply of goods and for settling the due, he agreed to sell the property. Thereafter, a sum of Rs.5,00,000/- was paid to the Bank for release of the title deed of the property, which was under hypothecation and also agreed to repay the balance Rs.30,00,000/-.

13.In support of the application, besides his oral testimony, the third party/second respondent herein has relied upon four documents. They are,

(i) Copy of the plaint in O.S.No.87 of 2010, filed before the Principal District Munsif Court, Srivilliputhur, wherein the third party/second respondent herein has filed a suit for permanent injunction against the defendant/first respondent herein.

(ii) Copy of the petition and decreetal order in I.A.No.427 of 2010 filed in O.S.No.87 of 2010, granting temporary injunction restraining the defendant/first respondent herein from alienating the subject property.

(iii) Copy of the sale deed dated 03.05.2010.

(iv) Copy of the Encumbrance Certificate, dated 20.07.2010, after the alienation.

None of these documents relate to the alleged due of Rs.37,50,000/- owe by the defendant/first respondent herein to the third party/second respondent herein nor payment of Rs.43,00,000/- towards the sale consideration shown under Ex.P.3. The annexures to Ex.P.3 are acknowledgments to cash receipt and the payment of Rs.37,50,000/- on 09.07.2009 by the defendant Rajasekaran [first respondent] and payment of Rs.5,00,000/- by third party/second respondent herein into the loan account of the defendant/first respondent herein on 31.12.2009. On 03.05.2010, the date on which, the sale deed registered, the receipt of cash Rs.50,000/- is acknowledged. All these three acknowledgments for the receipt of money, by three different modes are typed in the stamp papers, dated 03.05.2010.

14.Above all, the perusal of the plaint filed by the third party/second respondent herein in O.S.No.87 of 2010 seeking permanent injunction against the defendant/first respondent herein from alienating or encumbering the subject property, which is marked as Ex.P.1, this Court finds that the third party/second respondent herein has averred that as per the sale agreement executed on 10.07.2009 before the Notary Public, Srivilliputhur, Rs.5,00,000/- has been paid as advance and he is ready to pay the balance sale consideration of Rs.30,00,000/- on execution of the sale deed as per the agreement, but the defendant/first respondent herein suppressing the agreement of sale with him trying to sell the suit property in favour of third party/second respondent herein, therefore, he must be prevented by an order of permanent injunction. This affidavit was sworn by the third party/second respondent on 19.02.2010.

15.Pending suit, the third party/second respondent herein claims that he and the defendant/first respondent herein arrived at a settlement and he *bona fidely* purchased the subject property. While in the plaint in O.S.No.87 of 2010 signed on 19.02.2010, he admitted that he has paid only Rs.5,00,000/- and ready to pay the balance Rs.30,00,000/- on the date of execution of the sale deed. All of a sudden, after notice in the applications for attachment before judgment caused by the Court below in I.A.No.126 of 2010 in O.S.No.46 of 2010 and I.A.No.127 of 2010 in O.S.No.47 of 2010, a sale deed has been registered on 03.05.2010 as if Rs.37,50,000/-

paid on 09.07.2009 and Rs.5,00,000/- was paid on 05.09.2009.

16.Neither in his plaint in O.S.No.87 of 2010 nor in his applications in I.A.Nos.380 and 381 of 2010, the third party/second respondent herein has disclosed the actual sale consideration shown the sale deed. While so, even going by his own documents, it is crystal clear that in the suit filed on 19.02.2010, he admits that a balance sale consideration of Rs.30,00,000/- has to be paid. Whereas the documents created for the purpose of defeating the appellants herein, says as if out of Rs.42,50,000/-, sale consideration of Rs.37,50,000/- was paid on 09.07.2009 and Rs.5,00,000/- was paid on 31.12.2009. A total sum of Rs.42,50,000/- is paid much before the institution of the permanent injunction suit. It is to be noted that the permanent injunction suit itself came to be filed much after the filing of the present suit.

17.In the attachment before judgment application, notice was ordered on 30.04.2010 to the defendant/first respondent herein to furnish security on or before 08.06.2010, failing which, attachment will be ordered. The notice in the attachment before judgment application admittedly affixed in the premises on 12.05.2010. Whereas, only after the attachment made absolute on 25.06.2010, the applications to raise the attachment filed by the third party/second respondent herein. The third party/second respondent herein in his deposition, admits that he maintains accounts and the defendant/first respondent herein had purchased goods from his property on various dates, totally to the tune of Rs.37,50,000/-. However, he has not produced the Ledger accounts. He had deposed that on 19.07.2009, there was sale agreement between him and the defendant/first respondent herein. But, the said sale agreement has not been produced for the scrutiny of the Court. The title deed to the property has also been not produced by him. He has not explained the inconsistency in his application and plaint regarding the sale consideration mentioned and the value shown in the sale deed.

18.The trial Court had miserably failed to examine the sale deed Ex.P.3, dated 03.05.2010 in the light of the recital found in the said document in respect of the consideration and the contradictions found in the application to raise attachment as well as the plaint averments in O.S.No.87 of 2010. Unfortunately, the trial Court only concentrated the validity of *pendente lite* transaction. Even while testing the validity of transaction, the language of Section 53 of the Transfer of Property Act, which legalize the transaction only if there is no collusion between the parties to defeat the right of any other person under any decree or order. Also, if the transfer of immovable property is made with intent to defeat or delay the creditor of the transferor, the same is voidable at the instance of the creditor. In the case on hand, the inconsistency regarding payment of sale consideration as exposed above clearly proves Ex.P.3 is a collusive document and also a fraudulent document created with an intention to defeat the creditor and the order of the Court.

19.The third party/second respondent herein cannot be construed as a *bona fide* purchaser when he failed to give accounts for the payment of sale consideration. To add the very same *modus operandi* has been adopted by the second respondent herein in the year 2008, to aid and assist the partnership by name, P.S.K.Sankaralingam & Co., in which, Rajasekaran [first respondent] is one of the partners, to defeat the Union Bank of India, Rajapalayam, when recovery proceedings was initiated against the said partnership firm and this has been established by the plaintiff by marking Ex.R.1, the plaint in O.S.No.402 of 2008. The Court below has omitted to consider this document also.

20.Creation of stamped document ante-dating the payment unravels his intention to defeat the creditors, who have already initiated recovery proceedings. Even according to his own plaint in O.S.No.87 of 2010, he has indicated that the defendant/first respondent herein owe money to several other creditors and trying to alienate the same, after entering into an agreement with him. The said agreement had never seen in the light of the day neither it was filed along with O.S.No.87 of 2010 nor marked as a document in the present Interlocutory Applications to raise the attachment.

21.Therefore, this Court holds that the orders of the trial Court, dated 25.01.2011, passed in I.A.No.380 of 2010 in O.S.No.46 of 2010 and I.A.No.381 of 2010 in O.S.No.47 of 2010, which are challenged in these Civil Miscellaneous Appeals, are liable to be set aside, accordingly, set aside.

22.In the result, these Civil Miscellaneous Appeals are allowed with costs. As a result, the applications filed by the second respondent in I.A.Nos.380 and 381 of 2010 in O.S.Nos.46 and 47 of 2010 stand dismissed. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To

The Principal District Judge,
Virudhunagar District at Srivilliputhur.

Copy to:-

The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.n (2 COPIES)

+2 CC to M/s.H.LAKSHMI SHANKAR, Advocate (SR-40176,40177[F] dated 23/12/2021)

+2 CC to M/s.N.TAMILMANI, Advocate (SR-40384,40383[F] dated 23/12/2021)

C.M.A.(MD)Nos.360 and 361 of 2012
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RD(4.01.2022) 12P 8C