



C.M.A.No.162 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 20.06.2022

PRONOUNCED ON: 07.07.2022

CORAM

THE HON'BLE Ms.JUSTICE P.T.ASHA

C.M.A.No.162 of 2020

and

C.M.P.No.1216 of 2020

Sabarivasen

... Appellant/1st Respondent/Decree Holder/Plaintiff

Vs

1. T.R.Mahalingam

2. Smt. Selvi

3.A.Sivasamy

4.Smt. Visalakshi

... Respondents/Petitioners/3rd Parties/3rd Parties

5.R.Balachandran

... Respondent/2nd Respondent/Judgment
Debtor/Defendant.

PRAYER : This Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of Civil Procedure Code, against the Order and Decreetal Ofder in E.A.No.3 of 2019 in E.P.No.7 of 2018 in O.S.No.348 jof 2013, on the file of the 1st Additional District Judge, Coimbatore dated 17.07.2019.

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For Appellant : Ms.V.Raghavachari
For Respondent-1 to 4 : Mr.P.Valliappan
For Respondent-5 : No appearance

J U D G M E N T

The decree-holder is the appellant before this Court challenging the order allowing the claim petition filed by the respondents 1 to 4 herein. Before traversing into the details of the petition under appeal it is necessary to briefly allude to the facts of the case. The appellant herein is referred to as the plaintiff and respondents 1 to 4 as claimants and the 5th respondent is referred to as the defendant for the sake of easy comprehension.

Facts of the Case:

2. The plaintiff herein had filed a suit OS.No.348 of 2013 on the file of the I Additional District Judge Coimbatore for recovery of a sum of Rs.28,42,155/- together with interest at 12% per annum. It is the case of



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the plaintiff that he was acquainted with the defendant, a law graduate and on account of this acquaintance the defendant had been borrowing money from the plaintiff. On 30.08.2010 he had borrowed a substantial sum of money stating that he required it for purchasing a property at Siddhapudur. All the payments were made by the plaintiff to the defendant by way of cheques. The total amount that has been given as a loan to the defendant was a sum of Rs.21,40,000/-. This amount has been given to the defendant spread over a period of four months. Thereafter, on 04.10.2010 the defendant had executed a promissory note for the total sum of Rs.21,40,000/- promising to repay the same on demand. The plaintiff had been repeatedly requesting the defendant to repay the said sum however, the request fell on deaf ears and finally in the 3rd week of June 2013, the defendant had issued a post-dated cheque dated 24.06.2013 for the entire principal sum of Rs.21,40,000/- alone. No amounts were given towards the interest. The plaintiff had presented the said cheque on the assigned date for collection, however it was returned with the endorsement "Account Closed". Therefore, the plaintiff had filed the above suit for recovery of money.



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3. Along with the suit the plaintiff had also taken out an application for attachment before judgement of the property which is the subject matter of execution. On 22.07.2013 an conditional order of attachment was passed directing the defendant to furnish security on or before 23.08.2013. Since the defendant had failed to furnish security attachment was ordered and the property was attached on 03.09.2013.

4. Thereafter, the parties had agreed to settle their disputes and the matter was referred to the Lok Adalat. In the Lok Adalat settlement, the plaintiff and the defendant entered into an agreement dated 13.02.2016 in and by which the defendant had agreed to pay a sum of Rs.22,00,000/- on or before 30.04.2016. The agreement which was reduced into writing also stipulated that on the payment of the above amount the attachment would be raised. Subsequently, a decree on the basis of the compromise was passed on 15.02.2016. Since the defendant had not complied with the decree the plaintiff had put the decree to execution in E.P.No.7 of 2018 on the file of the I Additional District Judge, Coimbatore seeking



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the sale of the property attached before judgement.

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5. The defendant had entered appearance and filed a counter in which he had contended that there was another suit O.S.No.378 of 2014 on the file of the I Additional District Judge, Coimbatore in respect of the very same property pending and that the execution proceedings and the suit had to be tried together. He had also put-forth a contention that though he had tendered the amount the plaintiff had refused to receive the same. He further contended that the attachment is deemed to have been raised upon the parties entering into a settlement and therefore sought for a dismissal of the execution proceedings.

6. Pending the execution proceedings and after the sale was ordered the claimants herein had filed EA.No.3 of 2019 in the month of March 2019 for raising the order of attachment before judgement effected in I.A.No.398 of 2013 in O.S.No.348 of 2013 on 03.09.2013. The claimants had based their claim on an agreement of sale dated 30.08.2010 said to have been entered into by them with the defendant. It



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is their case that under the said agreement of sale the defendant had agreed to sell the property for a total sum of Rs.29,00,000/- and a sum of Rs.24,00,000/- had been received as an advance by way of cheques on various dates. The agreement of sale was registered and the time for completion stipulated in the said agreement of sale was a period of 1 year. Thereafter, at the request of the defendant the time for performance of the contract was extended on three occasions. On 19.08.2011 it was extended by a period of 1 year. Thereafter, on 07.08.2012 the agreement was once again extended by a period of 1 year and lastly on 30.07.2013 the agreement was extended for a period of 9 months.

7. It is the case of the claimants that the original documents had been handed over to them. Though they were ready and willing to proceed with the sale, the defendant had been putting it off under one pretext or the other. Therefore, a notice dated 03.04.2014 was issued by the claimants to the defendant to which there was no reply. Thereafter, on 09.07.2014 the claimants had filed O.S.No.378 of 2014 seeking the relief of specific performance of the agreement of sale.



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8. The plaintiff had filed a counter *inter-alia* contending that the claimants were aware about the attachment even at the time of the filing of the suit O.S.No.378 of 2014 and therefore, as per the provisions of Order 21 Rule 58 (1)(b) of the Civil Procedure Code, (herein after referred to as the CPC) the claim cannot be entertained. They had further submitted that the agreement of sale appeared to be a collusive one as the same has been entered into and the advance amounts paid even before the property had been purchased by the defendant. The plaintiff further stated that in the proceedings in I.A.No.398 of 2013 in O.S No.348 of 2013 the defendant had not made any reference about this agreement of sale.

9. The learned I Additional District Judge, Coimbatore by his order dated 17.07.2019 was pleased to allow the claim petition. The learned judge relying upon the judgments reported in ***1990 (3) SCC 239 = CDJ 1990 SC 333 - Vannarakkal Kallalathall Sreedharan Vs. Chandramaath Balakrishnan & Another and 2008 (5) MLJ 252 (SC)***



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- *Kancheria Lakshminarayan Vs. Mattaparthi Shyamala and Others.*

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held that the attachment of the property by the plaintiff was after the agreement of sale and therefore, the claimants had a pre-existing right over the same. The learned Judge disagreed with the contention of the plaintiffs that the order of attachment was hit by the provisions of Order 21 Rule 58 (1)(b) of the CPC. Challenging the said order the plaintiffs/appellants are before this Court.

Submissions:-

10. Mr.V.Raghavachari, learned counsel appearing on behalf of the appellant would raise the following objections to the order under appeal:-

i) He would contend that as per the provisions of Order 21 Rule 58 (2), of the CPC the Court is bound to consider an application filed under the said provisions as a suit and the Court cannot relegate the parties to the filing of the separate suit. In support of this argument he would rely upon the judgements of this Court reported in **(1988) 1 Law Weekly 131.**

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ii) He would further submit that the agreement of sale entered into between the claimants and the defendant by itself is a collusive one which is clearly evident from the fact that the advance payments are said to have been made even before the property had been purchased by the defendant and further the agreement of sale between the claimants and the defendant and the sale deed in favour of the defendant have been registered on the very same day.

iii) The next argument that was put forward by him was that the agreement of sale does not confer any title, right or interest in the property. In support of this argument he would rely upon the unreported judgment of the Hon'ble Supreme Court in **SLP (C) No.10022 of 2016 - Kaushalia Vs. Jodha Ram and Ors.**

iv) He would submit that the claimants who were aware about the attachment as early as in the year 2014 have deliberately waited till the execution proceedings had been filed and sale ordered to take out this



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application. The application has been deliberately delayed. Therefore, he would submit that the order subject matter of this appeal has to be set aside.

11. Per contra, Mr. P.Valliappan, learned counsel appearing on behalf of the claimants/respondents would submit that the agreement of sale take precedence over the attachment since the agreement of sale had been entered into much before the attachment order and therefore, the Court below has rightly allowed the claim petition. He would further submit that the appellant/plaintiff has moved the Court as soon as the Court has ordered the sale of the properties. He would rely upon the following judgments in support of his arguments:-

<i>Sl.No</i>	<i>Judgments</i>
1.	<i>AIR 1992 Madras 176 [Kalyaniammal - vs- Punjab National Bank by its Manager, Tirunelvi Town and Others.</i>
2.	<i>AIR 2008 Supreme Court 2069 [Kancherla Lakshminarayana -vs- Mattaparthi Shyamala and Another]</i>
3.	<i>1990 0 Supreme (SC) 138 [Vannarakkal Kallalathil</i>



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Sl.No	Judgments
.	<i>Sreedharan - vs- Chandramaath Balakrishnan and Anothers.</i>
4.	<i>AIR 1952 Travancore-Cochin 467 [Kochuponchi Varughese - vs- Ouseph Lona.</i>
5.	<i>AIR 1973 Calcutta 432 [Purna Chandra Basak - vs- Daulat Ali Molla.</i>
6.	<i>AIR 2008 Karnataka 51 [D.L.Sridhar - vs- C.R.Chandramohan.</i>
7.	<i>AIR 2010 Patna 172 [Ramadhar Singh and Ors - vs- Ram Narayan Sharma and Others.</i>
8.	<i>AIR 1974 Madras 16 [Angu Pillai and others - vs- M.S.M.Kasiwiswanathan Chettiar and Others.</i>

12. He would therefore submit that the order has to be sustained.

He would rely upon the judgment in 1993 SC 291 - *Vannarakkal Kallalathil Sreedharan - vs- Chandramaath Balakrishnan and Anothers*, AIR 2008 Supreme Court 2069 - *Kancherla Lakshminarayana -vs- Mattaparthi Shyamala and Another* and AIR 1974 Madras 16 - *Angu Pillai and others - vs- M.S.M.Kasiwiswanathan Chettiar and Others.* and AIR 1992 Madras 176 [*Kalyaniammal - vs- Punjab National Bank by its Manager, Tirunelvi Town and Others* in support of his contention that the right of an attaching creditor is subservient to that



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of an agreement holder prior to the attachment.

Discussion:-

13. In order to appreciate the issue on hand it is necessary to set out the sequence of the events starting from the borrowal by the defendant and the execution of the agreement of sale to the filing of the claim petition.

Chronology of dates and events:-

<i>S. No</i>	<i>Dates</i>	<i>Events</i>
1.	28.06.2010 to 04.10.2010	Defendant borrows a sum of Rs.21,40,000/-
2.	30.08.2010	Defendant purchases the property.
3.	30.08.2010	Agreement of sale entered into between the defendant and claimants.
4.	04.10.2010	Promissory note executed by the defendant in favour of the plaintiff for a total sum of Rs.21,40,000/-.
5.	24.06.2010	Cheque for Rs.21,40,000/- was presented for



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S. No	Dates	Events
		payment and dis-honoured.
6.	19.08.2011	Agreement of sale between the claimants and the defendant extended by a further period of one year.
7.	07.08.2012	2nd extension of agreement of sale for a further period of one year.
8.	28.06.2013	Suit OS.No.348 of 2013 filed by the plaintiff before the I Additional District Judge Coimbatore.
9.	----	Along with the the suit an application for attachment before Judgement in IA. No.398 of 2013 was filed and notice to furnish security by 16.07.2013 was issued.
10.	16.07.2013	Defendant has entered appearance.
11.	22.07.2013	Since the defendant had not furnished security, the conditional order of attachment passed.
12.	30.07.2013	Agreement of sale between claimants and the defendant extended for the third time for a further period of 9 months.
13.	23.08.2013	Since the judgement debtor fails to furnish security attachment is ordered.



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<i>S. No</i>	<i>Dates</i>	<i>Events</i>
14.	03.09.2013	Property is attached.
15.	09.07.2014	Suit OS No.378 of 2014 filed by the claimants against the defendant for specific performance of the agreement of sale dated 30.08.2010.
16.	13.02.2016	The plaintiff and the defendant entered into a settlement before the Lok Adalat.
17.	15.02.2016	A compromise is entered into before the Lok Adalat is recorded and a decree passed in terms thereof.
18.	23.04.2018	E.P.No.07 of 2018 filed by the plaintiff to bring the property to sale.
19.	March 2019	The claim petition in E.A.No.3 of 2019 in EP.No.7 of 2018 filed by the claimants against the plaintiff and defendant.
20.	17.07.2019	E.A.No.3 of 2019 is allowed.

14. A perusal of this chronology of events brings fourth two striking details which persuades this Court to take note of the fact that the agreement of sale dated 30.08.2010 executed between the defendant and



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the claimants appears to be a collusive one and aimed at removing the property out of the reach of the creditors.

(a) On the date on which the advance amount have been paid the defendant was not the owner of the property. A perusal of Ex.P.9, the plaint in O.S.No.378 of 2014 would highlight that the cheques for the sum of Rs.24,00,000/- have all been issued on 26.08.2010 by each of the claimants under five cheques. The agreement of sale which has been marked as Ex.P.1 is dated 30.08.2010. The agreement would recite that the suit property belongs to the defendant by virtue of a sale deed of the same date which has been registered as Document No.4692 of 2010 on the file of the SRO, Ganapati. In the agreement it has been clearly stated that the purchasers have not been put in possession of the property. The defendant has purchased the property for a sum of Rs.28,00,000/- and on the very same date has agreed to sell the same to the claimants for a sum of Rs.29,00,000/- just a sum of Rs.1,00,000/- over and above the price for which he had purchased the said property. The fact that the advance amount has been paid even prior to the property being purchased by the



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defendant gives rise to a suspicion about the transaction. In the sale deed under which the defendant has purchased the property there is no recital that the vendor therein and the defendant had earlier entered into an agreement of sale thereby creating a right to the defendant in the property even prior to the date on which the advance cheques have been given by the claimants. The plaint, Ex.P.9 also does not contain any explanation as to why the claimants have paid an advance of over a sum of Rs.24,00,000/- without a sale deed being executed in favour of the defendant. The dates assumes significance since the defendant had started to borrow from the plaintiff right from 28.06.2010 and by executing the agreement of sale the defendant has tried to remove the property out of the reach of the creditors namely, the plaintiff herein.

(b) Another factor which once again ignites suspicion in the mind of this Court is the fact that the agreement of sale was being extended on three occasions. In the 2nd extension dated 07.08.2012 it is stated that the defendant requires time to submit the documents of title, encumbrance certificate and for updating the payment of tax which are



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the conditions that have been imposed in the agreement of sale. Once again in the deed dated 30.07.2013, the extension is once again for the very same reason. However a perusal of the agreement of sale dated 30.08.2010 would indicate that no such obligation has been imposed on the defendant.

15. The appellants have challenged the order on the ground that the Court below has summarily allowed the claim petition overlooking the provisions of Order 21 Rule 58(2) which provides that a claim petition has to be decided like a suit. The plaintiff has raised serious objections with regard to the agreement of sale stating that the same is a collusive one and has also raised the defence that the claim petition has been filed with a delay particularly when the claimants had been aware about the attachment even as early as in the year 2014. The fact that the claimants were aware of the attachment even in the year 2014 is evident from a reading of para no.15 of Ex.P.9 which reads as follows:-

*" The plaintiffs submit that though the 7 days time
as has been stipulated in the notice dated 03.04.2014*



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lapsed, after receipt thereof by the defendant, he neither issued any reply nor come forward to comply with the demand of the plaintiffs. Subsequently, on getting Encumbrance Certificate, the plaintiff, to their shel shock and dismay, came to know that when the above said registered Sale agreement Extension Deed dated 30.07.2013 is very much existence, subsistence and alive, the defendant has chosen to encumber the suit property; and the plaintiffs were able to see an Entry therein to the effect that the suit property has been attached by the learned I Additional District Judge, Court Coimbatore in I.A.No.398/2013 in O.S.No.348/2013. The plaintiffs submit that the only intention of the defendant is to defraud the plaintiffs and get illegal and unlawful gain from them. The above said encumbrance will not bind on the plaintiffs in any way; and the same has been intentionally, deliberately, consciously, calculatingly, knowingly and wantonly created by the defendant, after entering into the Sale Agreement Extension Deed dated 30.07.2013 by him



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with the plaintiffs. The said Encumbrance Certificate dated 30.04.2013 is produced as Plaint Document No.10."

16. On the date of filing of the suit for specific performance, O.S.No.348 of 2013 was pending and an order of attachment before judgement had been passed. If the claimants were bonafide agreement holders who were aggrieved by the attachment they would have immediately taken out an application for raising the attachment. Therefore, there appears to be a deliberate delay on the side of the claimants. It was well open to the claimants to have questioned the attachment even pending the suit since the provisions of Order 38 Rule 11(A) provides that the provisions of Order 21 Rule 58 would be applicable for an attachment made under the provisions of Order 38 Rule 5 of the CPC. Once the provisions of Order 21 Rule 58 apply then the provisions of Order 21 Rule 58(1) proviso (b) automatically became applicable. There is no explanation on the side of the claimants regarding the delay. Further nowhere in the claim petition has the claimants stated as to how and when they have come to know about the attachment and the proposed sale of the property. On the contrary, the chronology of the



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dates and events which has been narrated in paragraph no.13 and Ex.P.9 clearly demonstrates that despite having knowledge about the attachment even in the year 2014 despite which the claimants have not taken any steps whatsoever to raise the order of attachment. They have waited till the executing Court has ordered sale to move the application. This is a case where the claimants have designedly and deliberately not taken steps to raise the attachment. The Hon'ble Division Bench of the Kerala High Court in the judgement reported in ***AIR 1984 Ker 237 - B.M.Aishabi Vs. A.Yakub and Others*** was considering the proviso (b) Order 21 Rule 58(1) of CPC and the argument advanced therein was that the claim was designedly and unnecessarily delayed. The Hon'ble Bench was testing the correctness of the order of the Court below in refusing to entertain the claim petition on the ground of deliberate delay. The Hon'ble Bench has observed as follows in para no.3 of the said judgement;-

" Clause (b) of the proviso to sub-rule (1) lays down that no claim or objection shall be entertained where the Court considers that the claim or objection was designedly or unnecessarily delayed. Sub-rule (2) confers plenary powers



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upon the Court to determine all the questions relating to the claim or objection. Sub-rule (4) describes the effect of the order "where any claim or objection has been adjudicated upon" by providing that it shall have the same effect and be appealable as a decree. Sub-rule (5) provides for the other situation, where the Court refuses to entertain the claim or objection under the proviso to Sub-rule (1). Under the terms of the proviso to Sub-rule(1) no claim or objection shall be entertained if it is designedly or unnecessarily delayed, and where it is refused to be entertained the party against whom such an order is made can institute a suit to establish his right under Sub-rule (5). Where, on the other hand, there has been an adjudication, sub Rule(4) enacts that the resultant order shall be subject to appeal as if it were a decree."

Ultimately the Bench had dismissed the appeal filed by the claimant. In the instant case, the claimants have not provided any reason for not approaching the Court as soon as they had come into knowledge about the attachment; at least from the date of filing of the suit



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OS.No.378 of 2014.

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17. A perusal of the judgement passed by the Court below would clearly indicate that the said application has been dealt with summarily without advertng to the substantial objections put across by the plaintiff. The learned District Judge has allowed the application filed by the claimants on the ground that the right of the prior agreement holder is of a greater degree than the right of the auction purchaser. This proposition can be pressed into service if the agreement of sale is genuine one and not tainted with suspicion.

18. In the judgment of this Court reported in *AIR 1992 Madras 176 - Kalyaniammal -vs- Punjab National Bank by its Manager, Tirunelvi Town and Others* this Court while dealing with an application under Order 21 Rule 58 has held that if there is a real agreement of sale prior to the attachment that would prevail over the sale held in Court auction; the emphasis being on the fact that the agreement of sale should be a bonafide one. The narration of the events in the foregoing paragraphs



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would clearly indicate that the sale agreement lacks bonafides. Therefore, the order of the learned District Judge stating that the agreement holder would have a greater right than the purchaser under an auction sale would not apply to the facts of the case on hand.

19. The learned District Judge has rejected the argument regarding the provisions of Order 21 Rule 58(1) proviso (b) summarily by contending that the application has not been deliberately delayed which in the light of the above discussion is clearly an erroneous statement, particularly in the light of the contents of Ex.P.9. It is also informed that the claimants are yet to get a decree for specific performance. In these circumstances, the Civil Miscellaneous Appeal is allowed and the order passed by the Court below is set aside. No costs. Consequently, the connected Civil Miscellaneous Petition is closed.

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Index : Yes / No
speaking Order : Yes / No
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1.The 1st Additional District Judge, Coimbatore.

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P.T.ASHA, J.,

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Pre-delivery Judgment in
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