



IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

Reserved on	22.10.2021
Pronounced on	25.01.2022

THE HONOURABLE Mrs.JUSTICE S.KANNAMMAL

C.M.S.A.No.2 of 2012 &
M.P.No.1 of 2012

K.P.Devanath

..Appellant/Third Party

Vs.

1. Chandika V.Nayak
2. K.Babulal

..Respondents/Decree holder &
Judgment Debtor

Prayer: Civil Miscellaneous Second Appeal filed under Order 21 Rule 58 r/w Section 100 of C.P.C., against Judgment and Decree dated 31.10.2011 made in CMA No.3 of 2010 on the file of Additional District Judge (Fast Track Court No.1) Poonamallee confirming the Judgment and decree dated 02.11.2009 made in E.A.No.97 of 2008 in E.P.No.32 of 2006 in O.S.No.193 of 2003 on the file of Sub Court, Poonamallee and prays to set aside the same.

For Appellant : Mr.V.R.Appaswamee

For Respondents : No appearance

J U D G M E N T

The present Civil Miscellaneous Second Appeal is filed by the appellant, [who is the third party, against the respondents, who are the decree holder and judgment debtor respectively] against Judgment and Decree dated 31.10.2011 made in CMA No.3 of 2010 on the file of Additional District Judge (Fast Track Court No.1) Poonamallee confirming the Judgment and decree dated 02.11.2009 made in E.A.No.97 of 2008 in E.P.No.32 of 2006 in O.S.No.193 of 2003 on the file of Sub Court, Poonamallee.

2. The brief facts of the case, leading to the filing of this appeal, as averred by the appellant, are as follows:-



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2.1. The appellant purchased the property, bearing Door No.8/38, Gango Caverry Street, Vigneswara Nagar, situated at S.No.333/16 at Porur, Ambattur Taluk, measuring 2200 Sq.ft., and S.Nos.53/1 and 54/2 in Madanadapuram Village, Sriperumpudur Taluk measuring 200 sq.ft., [under attachment in the EP on 30.02.2006] for a valuable consideration from one R.Devi rep. By her power agent, viz., S.Raman by way of a sale deed dated 20.03.2006, for which the appellant availed loan for a sum of Rs.18,50,000/- from the LIC. The appellant paid Rs.28,240/- for registration fee and spent Rs.2,24,000/- for purchase of nonjudicial stamp paper. The sale deed was also registered in the office of SRO, Kundrathur on 20.03.2006 as Doc.No.2723/2006. The appellant's vendor, viz., Devi purchased the said property from K.Babulal, viz., 2nd respondent, on 12.04.2004 for a sum of Rs.19,00,000/- and the sale deed was registered before the SRO, Kundrathur, as Doc.No.3047/2004.

2.2. The appellant is not aware of the suit, viz., O.S.No.193 of 2003 between the respondents. Since there was no representation on behalf of the 2nd respondent /Judgment debtor, suit was set exparte and exparte decree was passed in favour of the 1st respondent and the property was attached on 09.12.2004. The appellant filed a claim petition in E.A.No.97 of 2008 in E.P.No.32 of 2006 in O.S.No.193 of 2003 to raise the attachment stating that the property shown in the execution petition cannot be brought for sale, because the property does not belong to the Judgment debtor / 2nd respondent as on the date of attachment and the judgment debtor is not residing in the said property after 12.04.2004, thereby pleaded to allow the claim petition of the appellant and raise the attachment over the whole of the property in question.

2.3. The 1st respondent, who is the decree holder, submitted a counter and after enquiry, the execution court dismissed the claim of the appellant. Challenging the same, the appellant preferred an appeal, by way of C.M.A.3 of 2010 before the learned Additional District Judge, Fast Track Court No.1, Poonamallee stating that the attachment of the suit property was after the sale to the appellant and the description of the property in the attachment was not clearly mentioned and hence he requested to raise the attachment.

2.4. The learned Additional District Judge, Fast Track Court No.1, Poonamallee in C.M.A.No. 3 of 2010, on 31.10.2011, upon hearing the submissions and perusing the documents, held that the vendor of the appellant herself was not having any right over the suit property since she purchased the property after attachment of the sale property and thereby dismissed the appeal. As against the said dismissal of the appeal, the appellant has preferred this Civil Miscellaneous Second Appeal.



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3. The following substantial questions of law are raised in this Civil Miscellaneous Second Appeal :

(1) Whether the Courts below are right in dismissing the Claim Petition filed by the appellant herein, when Order XXXVIII Rule 11-B and Order XXI Rule 58-A of Civil Procedure Code were not complied with ?

(2) Whether an order of attachment, which was passed subsequent to sale, will bind on the bonafide purchaser ?

(3) Whether the Courts below are right in dismissing the Claim Petition filed by the appellant herein when at the time of purchase of the Petition mentioned properties by the appellant and his vendor, there was no any entry or encumbrance in the Registry of the Sub-Registrar, Kundrathur with regard to the order of attachment, dated 09.12.2004 ?

(4) Whether the Courts below are right in dismissing the Claim Petition filed by the appellant herein when the petition mentioned properties were sold by the second respondent/judgment debtor to and in favour of one Smt.Devi, who is the vendor of the appellant herein, through a registered Sale Deed, dated 12.04.2004, in Document No.3047 of 2004 on the file of Sub-Registrar Office, Kundrathur, even prior to the date of an order of attachment was passed on 09.12.2004 ?

4. Learned counsel for the appellant submits that on 20.03.2006, when the petition mentioned properties were purchased by the appellant through Ex.A.1, Sale deed, there was no entry in the SRO, Kundrathur in respect of an order of attachment dated 09.12.2004. The properties were sold by the Judgment Debtor, viz., 2nd respondent to and in favour of one Devi, who is the vendor of the appellant, through a registered sale deed, viz., Ex.A.9, sale deed, dated 12.04.2004, even prior to the date of order of attachment, which was passed on 09.12.2004, and, therefore, the order of attachment is not at all binding on the appellant nor his vendor.

5. Learned counsel for the appellant also submits that the public notice was also issued by the appellant in tamil news paper 'Makkal Kural' dated 23.02.2006 before purchasing the property. In view of the fault on the part of the office of the Sub Registrar, by not effecting the attachment before Judgment passed in I.A.No.583 of 2004 in O.S.No.193 of 2003, the appellant should not be affected.

6. It is represented on behalf of the appellant that only after the year 2008, the appellant came to know the fact that



the 1st respondent herein filed a suit for recovery of money against the 2nd respondent in O.S.No.193 of 2003 claiming an amount of Rs.1,33,000/- based on a pro note and along with the said suit, the 1st respondent had filed an interim application in I.A.No.583 of 2004 for attachment before judgment against 2nd respondent's property for the said amount. In the said I.A., the attachment before Judgment was ordered on 09.12.2004 and the same was registered before the concerned SRO on 14.12.2004, but the same was not reflected in the encumbrance certificate, due to the defects in the description of property, and, in the meantime, the vendor of the appellant, namely, Devi purchased the property on 12.04.2004, even before the date of attachment.

7. Learned counsel for the appellant placed reliance on the Judgment of the Hon'ble Division Bench of this Court reported in 2000 (2) CTC 524 (Mad) Sri Krishna Chit Funds Vs. R.S.Pillai and Another, wherein it is stated that the order of attachment should be registered before the concerned SRO with proper details, otherwise subsequent purchasers cannot be affected and the same principle has been followed in the case reported in 2002 (4) CTC 550 [Govinda Gounder Vs. Pichandi Pillai & Another]. Further, the learned counsel for the appellant contends that appellant had purchased the property for a valuable consideration of Rs.28 Lakhs in the year 2006 itself, whereas the order of attachment was for the claim of Rs.1,33,000/- based on a pronote, thereby pleaded to allow the present appeal.

8. Per contra, the respondents, before the trial court as well as before the lower appellate court, had denied all the averments put forth by the appellant and stated that only in order to create nuisance, the appellant has filed the petitions and thereby pleaded to dismiss the same.

9. Though notice through paper publication was effected on 20.11.2019 in tamil edition, viz., 'Makkal Kural' and the names of the respondents are printed in the cause list and sufficient opportunities were granted by this Court for the appearance of the respondents on 26.08.2021, 20.09.2021, 5.10.2021 and on 22.10.2021, there is no representation on behalf of the respondents before this Court either in-person or through learned counsel.

10. Heard the learned counsel for the appellant and perused the documents placed on record.

11. Appellant is a third party-claimant in the execution proceedings. Respondents 1 is the decree holder and Respondent 2 is the judgment debtor. First respondent had filed the suit O.S.No.193 of 2003 on the file of Sub-Court, Poonmallee, for



recovery of money due under a promissory note and obtained a decree against the second respondent on 18.07.2005. There was no appeal as against the said judgment and decree and, therefore, the said judgment and decree have become final. Thereafter, the first respondent initiated execution proceedings against the second respondent herein in E.P.No.32 of 2006 on the file of the Executing Court (Sub-Court), Poonamalee, for attachment of the suit schedule property belonging to the second respondent herein for realization of the amount due under the decree. Pending the said execution petition, the appellant herein has filed a claim petition in E.A.No.97 of 2008 for raising attachment over the whole of the property described in the schedule thereunder, as, according to him, the property mentioned in the execution petition does not belong to the judgment debtor as on the date of attachment and it was purchased by him from one R.Devi.

12. The Claim Petition was resisted by the decree holder, first respondent herein, contending that the said petition was filed in order to protract the proceedings and that she had applied for encumbrance certificate from 01.01.1994 to 18.1.2005 under Certificate No.11848, which reveals the attachment of the Court, dated 14.12.2004, and that the property was duly attached by the Court and the Execution Petition was ripe for further proceedings to put the property into Court auction and only with a view to stop the further proceedings, the said petition was filed.

13. The Executing Court, by an order, dated 06.10.2007, dismissed the claim petition on the ground that the schedule mentioned property was ordered to attach before judgment on 09.02.2004 and as per Ex.R-2, attachment order, the property was attached on 17.02.2004, but the vendor of the appellant purchased the property on 12.04.2004, that is, after attachment of the property, and the petition filed by the appellant/claimant stating that the correct number was not given in the attachment order was only to curtail the right of the decree holder to enjoy the fruits. Challenging the same, the appellant filed an appeal before the lower appellate Court, which was also dismissed.

14. Though the learned counsel for the appellant has relied upon some decisions in support of his contentions, it is well settled that every case has to be decided on its own merit. In this case, it is the specific case of the appellant that he purchased the property for a valuable consideration of Rs.28.00 lakhs in the year 2006, whereas the order of attachment was for the claim of Rs.1,33,000/- based on a pronote. Whether the sale transactions pertaining to the property in question took place knowingly or unknowingly before or after attachment of the property, since the same transpired after the decree was passed



in favour of the decree holder in the suit in O.S.No.193 of 2003 on 18.07.2005, and the attachment before judgment on 09.02.2004, the said decree cannot be rendered a nullity and the same has to be complied with in letter and spirit. The hard earned money of the decree holder cannot be put to jeopardy or loss. Therefore, in order to subserve the ends of justice to both the parties, as a via media, this Court is of the considered opinion to allow this appeal, subject to a condition.

15. Accordingly, this Civil Miscellaneous Second Appeal is allowed and the judgment and decree, dated 31.10.2011, passed in C.M.A.No.3 of 2010 on the file of Additional District Judge (Fast Track Court No.1), Poonamallee, are set aside, subject to the condition that the appellant pays the decretal amount to the first respondent-decree holder, who is the plaintiff in the suit in O.S.No.193 of 2003 on the file of Principal Sub-Court, Chengalpattu, within a period of one month from the date of receipt of a copy of this order. If the said condition is not complied with by the appellant, the judgment passed in this appeal shall stand automatically vacated and the appeal suffers dismissal. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

ssd/dixit

To

1.The Additional District Judge (Fast Track Court No.1),
Poonamallee.

2.The Subordinate Judge, Poonamallee.

3.The Principal Subordinate Judge, Chengalpattu

4.The Section Officer,
V.R.Section, High Court, Madras.

+2cc to Mr.V.R.Appaswamee, Advocate, Sr.No.4439(07/06/2022)

C.M.S.A.No.2 of 2012

SR(CO)

PR (13/04/2022)