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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.01.2022

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.S.A.No.35 of 2016

and

C.M.P.No.18342 of 2016

Saradambal Ammal (Deceased)

Balakrishnan (Deceased)

1.Tamizharasi

2.Gajira

.. Appellants/Appellants/Nil/Nil/Nil

Vs.

1.Govindharajan

2.Aruljothinadarajan

3.K.Rajasekaran

.. Respondents/Respondents/Plaintiff and
defendant

(R3 impleaded as party respondent
vide order of this Court dated
06.11.2019 made in C.M.P.No.958 of
2017 in C.M.S.A.No.35 of 2016)

Prayer: This Civil Miscellaneous Second Appeal is filed under Order XXI Rule 58 (5) of the Code of Civil Procedure r/w Section 100 of the Code of Civil Procedure, against the Fair and Final Order dated 15.07.2015 passed in C.M.A.No.38 of 2010 on the file of the 1st Additional District and Sessions Court, Cuddalore confirming the order dated 23.12.2009 passed in E.A.No.402 of 2007 in E.P.No.59 of 2006 in O.S.No.98 of 2005 on the file of the 1st Additional Sub Court, Cuddalore.

For Appellants : Mr.R.Muralidharan

For RR 1 & 3 : M/s.R.Meenal

For R2 : No appearance



J U D G M E N T

(The matter is heard through "Video Conferencing")

The Civil Miscellaneous Second Appeal is filed against the Fair and Final Order dated 15.07.2015 passed in C.M.A.No.38 of 2010 on the file of the 1st Additional District and Sessions Court, Cuddalore confirming the order dated 23.12.2009 passed in E.A.No.402 of 2007 in E.P.No.59 of 2006 in O.S.No.98 of 2005 on the file of the 1st Additional Sub Court, Cuddalore.

2.The appellants are legal representatives of one Saradambal Ammal who is third party to the suit in O.S.No.98 of 2005 and E.P.No.59 of 2006. The first respondent filed the said suit in O.S.No.98 of 2005 against the second respondent for recovery of money. Pending suit, the first respondent filed an application for attachment before judgment and attachment before judgment was ordered on 30.11.2005. After contest, the suit was decreed on 19.12.2005. The first respondent filed an Execution Petition in E.P.No.59 of 2006 to execute the decree by ordering sale of the petition mentioned property. After contest, by the order dated 07.03.2007, the Court ordered sale of the property. At that stage, the said Saradambal Ammal filed E.A.No.402 of 2007 under Order XXI Rule 58 of Code of Civil Procedure, to declare her as absolute owner of the property, she is in possession and enjoyment of the suit property and to raise attachment.

3.According to the said Saradambal Ammal, the second respondent is not the absolute owner of the petition property and she is the absolute owner of the petition property. She came to know about the order of attachment passed just one week prior to the filing of the petition. She is in possession and enjoyment of the petition mentioned property as absolute owner for more than 30 years. She has constructed a house in the petition mentioned property and is paying house tax and consumption charges to the Electricity Board. The respondents have colluded together and in order to defeat the rights of said Saradambal Ammal, filed Execution Petition and prayed for allowing the E.A.

4.The first respondent filed counter affidavit and denied all the averments made by said Saradambal Ammal. According to the first respondent, the said Saradambal Ammal is not the owner of the petition mentioned property and she is nothing to do with the petition property. Only at the instigation of the second respondent, she has filed the present petition in E.A.No.402 of 2007 to drag on the proceedings. The attachment before the judgment was effected on 30.11.2005, pending suit, prior to the decree. E.P was filed on 02.06.2006 and after contest, the sale



was ordered on 07.03.2007. At that stage, the second respondent used to pay very meager amount of Rs.1000/- and filed sale adjournment petition. The first respondent refused to receive the said amount. After taking adjournments, the second respondent protracted the proceedings. At that stage, the said Saradambal Ammal, after two years of attachment, has come out with the present E.A., which is not maintainable and prayed for dismissal of E.A.

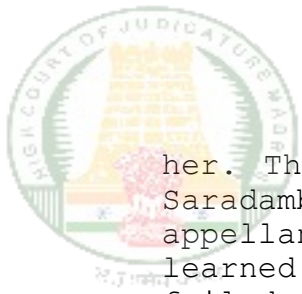
5.Before the learned Judge, the said Saradambal Ammal was examined as P.W.1 and 12 documents were marked as Exhibits Exs.P1 to P12. The first respondent examined himself as R.W.1 and marked 2 documents as Exs.R1 and R2.

6.The learned Judge framed necessary points for consideration. Considering the averments in the affidavit, counter affidavit, oral and documentary evidences and points for consideration, dismissed the application, holding that said Saradambal Ammal failed to prove that she is the owner of the petition mentioned property.

7.Against the said order of dismissal dated 23.12.2009, said Saradambal Ammal has filed C.M.A.No.38 of 2010. Pending C.M.A, the said Saradambal Ammal died. The appellants and one Balakrishnan were impleaded as legal heirs of said Saradambal Ammal by the order dated 11.09.2013 passed in I.A.No.54 of 2013. The said Balakrishnan also died and as per the order on memo dated 06.02.2015, the appellants were treated as legal heirs of the said Balakrishnan. The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge considering the materials available on record, order of the learned Judge and point for consideration, dismissed the appeal.

8.Against the said order of dismissal dated 15.07.2015 made in C.M.A.No.38 of 2010 confirming the order dated 23.12.2009 passed in E.A.No.402 of 2007 in E.P.No.59 of 2006 in O.S.No.98 of 2005, the present appeal is filed.

9.The learned counsel appearing for the appellants contended that the courts below failed to consider the documents filed by the said Saradambal Ammal. The First Appellate Court erred in holding that said Saradambal Ammal failed to prove her title and thereby failed to prove her possession. The judgment of the First Appellate Court is not based on any evidence and the courts below failed to appreciate the fact that the Saradambal Ammal became the owner of the property after the death of her husband Sethuraman and sons. The second respondent who is the great grandson of said Saradambal Ammal cannot get any right over the property simply because he is residing with



her. The Court below failed to consider the documents filed by Saradambal Ammal. The learned counsel appearing for the appellants filed written arguments and submitted that the learned Trial Judge erred in holding that the Saradambal Ammal failed to examine the first appellant and second respondent. The second respondent is the grand son of the Saradambal Ammal's elder daughter. Except this relationship, the second respondent has no right in the petition property. The Trial Court failed to consider how the second respondent is owner of the entire property. There is no proof to show that the second respondent is the owner of the petition property. The learned First Appellate Judge in paragraph No.12 of the judgment, held that the said Saradambal Ammal is the owner of the property and the appellants and second respondent are her legal heirs, after the death of Balakrishnan. The learned 1st Additional Judge further held that the suit property belongs to the first appellant Saradambal Ammal however, the second respondent alone is entitled to the petition property as her legal heir. Both the Courts below failed to consider Exs.P1 to P12, the Encumbrance Certificate and other documents. The First Appellate Court having given a clear finding that the appellants have got right in the petition mentioned property, erred in dismissing the appeal.

10.The learned counsel appearing for the appellants further submitted that the Courts below failed to properly appreciate Order XXI Rule 58 of the Code of Civil Procedure. The petition under this provision can be filed before sale. The term sale in the said provision is only when the sale is completed by confirmation of auction sale. When the petition under Order XXI Rule 58 is filed, all questions relating to the title of the property attached has to be adjudicated. In support of his contention, the learned counsel appearing for the appellants relied on the following judgments:

(i) AIR 2008 SCC 2069 (Kancherla Lakshminarayana Vs. Mattaparthi Shyamala and Others) the relevant portion of the judgment reads as follows:

"... 9.Shri Narasimha, learned counsel appearing on behalf of the appellant invited our attention to the language of Order XXI Rule 58 CPC which is as under:

"58. Adjudication of claims to, or objections to attachment of property. (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such



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attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained: Provided that no such claim or objection shall be entertained

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the court considers that the claim or objection was designedly or unnecessarily delayed. (2) xxxxxx (3) xxxxxx (4) xxxxxx (5) xxxxxx"

It is pointed by the learned counsel from the language of the clause (a) of proviso to Rule 58 (1) that where any objections are taken to the attachment on the ground that such property is not liable to attachment, the court has to proceed to adjudicate upon the claim or objections in accordance with the Rule. Learned counsel further argues that there is a rider to this Rule in the shape of a proviso and it is suggested that such claim or objection need not be entertained where firstly the property attached has already been "sold". Learned counsel points out that merely because of the auction of the suit property, it cannot be said that the said property is sold, thereby leaving no right in or opportunity with the objector to object to the attachment. Learned counsel invited our attention to the judgment of the Andhra Pradesh High Court in M/s.Magunta Mining Co. v. M. Kondaramireddy & Another [AIR (1983) A.P. 335] where the similar situation had arisen on the basis of an application made by the appellant under Order XXI



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Rule 58 CPC. The objector was none else but the son of the Judgment-Debtor whose property was auctioned. The objection was that since there was a prior lease in respect of the said property and since in pursuance of that lease the objector-appellant had been in possession of the same and, therefore, the attachment was not valid and has to be vacated. An objection was also raised that the properties which were attached were already sold and, therefore, the objection to the attachment and the appeal had become infructuous. The Court, therefore, dealt with the effect of the court sale conducted by the lower court. It was an admitted position that before the said order of High Court reached the sale was already completed in respect of all the items where the Decree-holder himself purchased the properties. It is also seen from the facts that there the sale was not confirmed. The Division Bench, speaking through Hon'ble Jagannadha Roa, J. (as His Lordship then was) observed in para 15:

"Whenever a claim is preferred under O. 21 R. 58 CPC against attachment of immovable properties, the fact that the properties are sold or the sale confirmed will not deprive the court of its jurisdiction to adjudicate on the claim. The inquiry into the claim can be proceeded with by the trial court or the appellate court (under the amended Code) and in the event of the claim being allowed, the sale and the confirmation of sale shall to that extent be treated as a nullity and of no effect, as



the judgment-debtor had no title which could pay to the court auction-purchaser."

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(ii) 2012 (5) LW 121, [S.Parimala Vs. A.Mayil & others];

" ... 15. At this juncture, it is pertinent to refer to the observations made by the Andhra Pradesh High Court in Mugunta Mining Co. Vs. M.Kondaramireddy (AIR-1983-AP-335) which has been extracted by the Honourable Supreme Court in the decision cited supra. It is stated as below:-

"The provisions of Order 21 Rule 59 CPC show that where before a claim is preferred or objection made, and the property attached had already been advertised for sale, the court may, if the property is immovable, make an order, that, pending the adjudication of the claim or objection the property shall not be sold, or that pending such adjudication, the property may be sold but the sale shall not be confirmed and any such order may be made subject to such terms and conditions as to security or otherwise as the court thinks fit. This provision therefore provides that pending adjudication of a claim in respect of immovable property the court may proceed with the sale but stay the confirmation. Obviously this has been made with a view to expedite the sale proceedings so that in the event of the claim being rejected, the further proceedings can go on expeditiously. But it is clear that as long as the sale is not confirmed the status quo ante can be restored in case the claim is allowed. It has been held that once the claim petition is allowed the sale will be treated as void because the interest of the judgment-debtor that was sold did not in fact belong to him and the court auction-purchaser would not get any title to the property as the judgment-debtor had no interest therein and because the claimant continues to retain his interest in those properties (vide Bibi Umatul Rasul v. Lakho Kuer -AIR-1941-Pat-405). To the same effect is Madholal Damlal v. Gajrabi (AIR-1951-Nag-194): (AIR p. 197, para 17)



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16. Bearing in mind the law laid down by the Honourable Supreme Court, in the present case, the claim application has been presented on 19.4.2011 on which date, the Executing Court seemed to have confirmed the sale after returning the application filed by the Revision Petitioner/ objector. Hence, it is obvious that the claim application filed by the revision petitioner has not been disposed of in accordance with the provisions of Order 21 Rule 58 of CPC even though it was filed even before confirmation of sale. At this juncture, I am not inclined to traverse into the merits urged by the parties, as the contentions raised the parties have to be substantiated by corroborative evidence and acceptable

17. It is needless to mention that the adjudication referred to under Order 21 Rule

58 of CPC not being summary and that it should be a decision as if rendered in a regular suit resulting in an appealable decree. Therefore, I am of the view that a fuller examination of the rights of the parties has to be held after giving the parties adequate opportunity to place all relevant materials, so that it could ultimately decide and adjudicate on all questions including questions relating to right, title or interest in the property attached which either directly or indirectly arise between the parties to the proceedings. This not having been done by the Trial Court, I am constrained to set aside the impugned order of the learned District Munsif, Madurai and remit the subject matter back to the learned District Munsif, Madurai for a fuller and detailed examination as contemplated under the provisions of Order 21 Rule 58 of CPC and for an ultimate decision after adjudication of the rights of the parties."

10(a).The learned counsel appearing for the appellants further submitted that the appellants have rights over the petition property along with the second respondent and first respondent cannot execute the decree obtained against the second respondent and sell the property to realise the amount and



prayed for allowing the appeal.

11. Per contra the learned counsel appearing for the respondents 1 & 3 contended that said Saradambal Ammal filed E.A.No.402 of 2007 claiming to be the owner of the petition property and prayed to declare her as owner of the petition property, she is in possession and enjoyment of petition property and to raise an attachment. The said Saradambal Ammal has not filed any documents of title and failed to substantiate the title that she is the owner of petition property. The documents filed by the said Saradambal Ammal which were marked as Exs.P1 to P12 did not prove her title or title of her husband or her son R.Pandiyarajan. The learned Trial Judge as well as the First Appellate Judge considered all the materials placed before them and by well considered order and judgment, held that said Saradambal Ammal failed to prove her title that she is owner of the petition property. The contention of the learned counsel for the appellants that the Court below failed to consider the provisions of Order XXI Rule 58 of the Code of Civil Procedure and failed to adjudicate the title of Saradambal Ammal that she is the owner of the petition mentioned property is not correct and the Courts below have rightly rejected her claim. There is no reason to interfere with the well considered order and judgment of the Courts below. No substantial questions of law arises in the present appeal. The learned counsel for the first respondent referred to the dates and events filed by her in the appeal and prayed for dismissal of the appeal.

12. Though notice has been served on the 2nd respondent and his name is printed in the cause list there is no representation for him, either in person or through counsel.

13. Heard the learned counsel appearing for the appellants as well as the learned counsel appearing for the respondents 1 & 3 and perused the entire materials on record.

14. The present Civil Miscellaneous Second Appeal is filed against the fair and final order dated 15.07.2015 passed in C.M.A.No.38 of 2010 on the file of the 1st Additional District and Sessions Court, Cuddalore confirming the order dated 23.12.2009 passed in E.A.No.402 of 2007 in E.P.No.59 of 2006 in O.S.No.98 of 2005 on the file of the 1st Additional Sub Court, Cuddalore. The Civil Miscellaneous Second Appeal is not admitted and no substantial question of law is framed. The appellants in the grounds of appeal has raised the following substantial questions of law:

Substantial Questions of Law which arise for consideration are as follows:



(i) Whether the finding in para 13 of the Judgment of the Appellate Court that the 1st Respondent has become the absolute owner of the property is sustainable in law?

(ii) Whether the findings of the Courts below, without discussing the Voluminous documents filed on the side of the appellant, are sustainable in law?

(iii) To what relief the Appellants are entitled to?

15. From the materials on record, it is seen that the said Saradambal Ammal filed E.A.No.402 of 2007 under Order XXI Rule 58 of the Code of Civil Procedure claiming to be the owner of the property, declaration that she is in possession and enjoyment of the property and to raise the order of attachment. After taking E.A. on file, the said Saradambal Ammal examined herself as P.W.1 and marked 12 documents as Exs.P1 to P12. The first respondent / decree holder has examined himself as R.W.1 and marked two documents Exs.R1 and R2. In the C.M.S.A., the learned counsel appearing for the appellants contended that the Courts below failed to comply Order XXI Rule 58 of the Code of Civil Procedure. For better appreciation of said contention, Order XXI Rule 58 (1) & (2) of the Code of Civil Procedure is extracted hereunder:

“Order XXI Rule 58 of Code of Civil Procedure:

58. Adjudication of claims to, or objections to attachment of, property:-

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained-

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the



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property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit."

As per Order XXI Rule 58 (2) of the Code of Civil Procedure, when an application is filed by a party under Order XXI Rule 58 (1), the Court has to adjudicate all the questions including the questions relating to right, title or interest in the property attached and no separate suit can be filed in this regard, with regard to claim of the party to raise all attachment.

16. In the present case, the Trial Court gave opportunity to the applicant Saradambal Ammal to prove her claim that she is the owner of the petition property. The said Saradambal Ammal examined herself as P.W.1 and marked 12 documents. After considering the evidence of Saradambal Ammal and documents filed by her, the Trial Court dismissed the application holding that she has not established her title and possession of petition property. This finding clearly shows that the Trial Court adjudicated the claim of Saradambal Ammal and rejected the same. Similarly, the First Appellate Court also considered all the materials placed before it including the Exs.P1 to P12, order of Trial Court and dismissed the C.M.A. Therefore the contention of the learned counsel appearing for the appellants that the Courts below failed to comply with provisions of Order XXI Rule 58 of the Code of Civil Procedure is contrary to the order of Trial Court and judgment of First Appellate Court and is without merits.

17. The only issue in the E.A., C.M.A. as well as in the present C.M.S.A. is whether the Saradambal Ammal has proved that she is the owner of the petition property.

18. According to Saradambal Ammal, originally her husband Sethuraman and her son Pandiarajan were owners of petition property. Even though the said Saradambal Ammal marked Exs.P1 to P12, she has not produced any documents of title to show that her husband Sethuraman and her son Pandiarajan were owners of the property. All the documents filed by her relates to House Tax Receipt and Encumbrance Certificate. House Tax Receipts and Encumbrance Certificate do not prove that Sethuraman and Pandiarajan were the owners of the petition property and after their death, the said Saradambal Ammal has become the owner of the property. Except her oral evidence, she has not produced any acceptable documentary evidence to prove the ownership of the



petition property. Even after the death of Pandiarajan in the year 1996, House Tax Assessment still stands in the name of Pandiarajan only. The said Saradambal Ammal has not given any explanation for not transferring the assessment in her name. Both the Trial Court as well as the First Appellate Court have considered the evidence placed before the Courts elaborately and by giving cogent and valid reason, rejected the claim of the said Saradambal Ammal. In the C.M.S.A., the learned counsel for the appellants failed to point out any document produced by the Saradambal Ammal to prove her case that originally her husband Sethuraman and her son Pandiarajan were owners of petition property and after their death, she became absolute owner. Therefore, no substantial question of law arises with regard to finding of the Courts below that the said Saradambal Ammal failed to prove her ownership of the petition property.

19.The first substantial question of law raised by the appellants has no relevancy to the issue in the C.M.S.A., as the only issue in the present case is whether the said Saradambal Ammal is owner of petition property and she has proved the same by acceptable evidence and the same is answered against the appellants.

20.As far as second substantial question of law raised by the appellants is concerned, both the Courts below have considered all the documents filed by the said Saradambal Ammal and held that those documents did not prove the title of Saradambal Ammal. In view of well considered order and judgment of Courts below, the second substantial question of law raised by the appellants is answered against the appellants. In view of substantial questions of law 1 & 2 are answered against the appellants, the appellants are not entitled to any relief.

21.For the above reasons, this Civil Miscellaneous Second Appeal is dismissed as devoid of merits. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar (CS-VIII)

//True copy//

Sub Assistant Registrar

ata/krk

To

1.The learned I Additional District and Sessions Judge,
Cuddalore.



2. The learned I Additional Subordinate Judge,
Cuddalore.

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

+1cc to Mr.R.Muralidharan, Advocate SR.No.3816

+1cc to M/s.R.Meenal, Advocate SR.No.3927

C.M.S.A.No.35 of 2016

SR(CO)
GMY(15/03/2022)