



CRP (NPD) No.975 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.07.2022

Pronounced on : 18.07.2022

CORAM

THE HONOURABLE Mrs. JUSTICE S.KANNAMMAL

C.R.P.(NPD).No.975 of 2020

Senthil

...

Petitioner

-VS-

1.Rajamani

2.Sasikala

...

Respondents

Prayer: Civil Revision Petition is filed against the fair and final order, dated 28.08.2019, passed in I.A.No.103 of 2016 in O.S.No.9 of 2016 on the file of IV Additional District Court, Bhavani, Erode District.

For Petitioner .. Mr.M.R.Thangavel

For Respondent 1 .. Mr.S.Anbazhagan



CRP (NPD) No.975 of 2020

ORDER

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Petitioner, who is a third party to the suit, has filed this Civil Revision Petition against the order, dated 28.08.2019, passed in I.A.No.103 of 2016 in O.S.No.9 of 2016 on the file of IV Additional District Court, Bhavani, Erode District, in and by which, the prayer of the petitioner for lifting the attachment of the petition schedule property before judgment made in I.A.No.12 of 2016 on 07.04.2016 was rejected.

2. The case of the petitioner before the trial Court was as follows :

The property mentioned in the schedule to the petition originally belonged to the second respondent by virtue of a registered sale deed, dated 16.07.2010. The second respondent, with an intention to sell the said property to the petitioner for a consideration of Rs.24,50,000/-, entered into an agreement of sale, dated 12.08.2015, vide Document No.1984/2015 of Ammapettai Sub Registry on payment of advance amount of Rs.7,00,000/- to the second respondent and the remaining amount of Rs.17,50,000/- was also paid to the second respondent when the sale deed was executed by the second respondent in favour of the petitioner on 15.12.2015 and possession was handed over to the



CRP (NPD) No.975 of 2020

petitioner on the same day. After execution of the sale deed, the second respondent, with crooked and frustrated mind, in order to get an illegal and unlawful gain from the petitioner, was hand-in-glove with the first respondent and made the first respondent to file the suit viz., O.S.No.9 of 2016 for recovery of amount, by creating a suit pronote. The suit promissory note and the alleged loan transaction are bogus and not genuine. The respondents joined together and created the suit promissory note in order to make a false claim in respect of the petition schedule property, which was already sold to the petitioner, with an ulterior motive to put in more troubles, by abusing the process of law. The petitioner is a bona fide purchaser of the property for value without any encumbrance. Pursuant to execution of the sale deed, he mortgaged the property with State Bank of India, Ammapettai Branch, and availed loan of Rs.20,80,188/- in the last week of December,2015, and the original sale deed was deposited with the bank. On 10.03.2016, the first respondent filed the suit for recovery of amount against the second respondent and along with the suit he also filed an application to attach the property mentioned in the schedule before judgment in I.A.No.12 of 2016 and sought attachment of the property, which was already sold by the second



CRP (NPD) No.975 of 2020

respondent in favour of the petitioner on 15.12.2015. The first respondent was well aware of the sale deed executed by the second respondent in favour of the petitioner in respect of the petition property. The first respondent, in order to cheat the petitioner, filed the application for attachment of the property, by suppressing the material facts. The Court also attached the property on 07.04.2016. At the time of filing the suit and the attachment application, the property did not belong to the second respondent. Hence, the petitioner prayed to pass an order, lifting the attachment made in I.A.No.12 of 2016 on 07.04.2016 in respect of the property mentioned in the schedule.

3. The case of the first respondent in the counter statement was as under :

The second respondent borrowed a sum of Rs.7,50,000/- from him on 14.04.2014 itself to construct a house in the petition property. The second respondent also borrowed loans from various persons and she was not able to repay the same, as she was in financial crisis. Therefore, she borrowed a sum of Rs.7,00,000/- from the petitioner. The petitioner and the second respondent made the alleged sale agreement and the sale deed



CRP (NPD) No.975 of 2020

WEB COPY

with an ulterior motive to cheat the lawful creditors. The second respondent has filed Debtor Insolvency Petition No.8/2015 on the file of Sub-Court, Bhavani, in which the petitioner was arrayed as 35th respondent. The petitioner and the second respondent, to defeat the right of the first respondent, purposely omitted to array the first respondent in the insolvency petition and after knowing the same, the first respondent filed an impleading petition in the insolvency petition and got impleaded therein. The debt borrowed by the second respondent from the first respondent was for construction of the house. Therefore, the petitioner is also liable to discharge the debt either by himself or jointly with the second respondent out of the property. Without discharging the debt, the petitioner is not entitled for raising of the attachment of the property.

4. The counter statement of the second respondent was as follows :

She was residing at Bank Street, Ammapettai, prior to construction of house in the petition property. While she was constructing house in the petition property, she was drawn into a situation to borrow loan from several persons, including the petitioner. She received a sum of Rs.7,50,000/- from the petitioner and executed a bond for sale of the



CRP (NPD) No.975 of 2020

property on 14.04.2013. She managed to repay the interest towards the loans borrowed for some time. Thereafter, she was not able to repay the interest also. In those circumstances, the petitioner approached her and promised that he would settle her entire loan to each and every creditor by entering into compromise with them. On believing the assurance given by the petitioner, she agreed to sell the petition property. On believing the promise and assurance given by the petitioner, she signed in the documents and she did not know that the petitioner also obtained her signature in the documents. In order to manage the critical situation, on the advice of the petitioner, she also filed the insolvency petition No.8/2015 on the file of Sub-Court, Bhavani, in which the petitioner was 35th respondent. On the compulsion of the petitioner, she executed the sale deed. Even after she executed the sale deed in favour of the petitioner, the petitioner did not settle the creditors and he also did not pay the balance sale consideration of Rs.3,00,000/- One Nachimuthu and Saraswathi filed the suits in O.S.Nos.346/2015 and 401/2015 against her. The petition property was attached in I.A.No.678/2015 in O.S.No.346/2015 and I.A.No.814/2015 in O.S.No.401/2015. These facts were well known to the petitioner, but he was claiming himself as a bona



CRP (NPD) No.975 of 2020

fide purchaser. In those circumstances, the first respondent filed the suit on pronote in O.S.No.9 of 2016 and obtained the order of attachment before judgment in I.A.No.12 of 2016, which fact was also well known to the petitioner. The Insolvency Petition filed by her was still pending before the Sub-Court, Bhavani. The first respondent also got impleaded himself as a party to the insolvency petition proceedings. The petitioner was also a party to the insolvency petition proceedings. Hence, it was incorrect to say that she had created a pronote in favour of the first respondent and on the strength of the same the original suit was filed by the first respondent. The petitioner was liable to settle the creditors of the second respondent. Hence, there was no necessity to raise the attachment order, dated 07.04.2016, in I.A.No.12/2016 in respect of the petition property and the petition was liable to be dismissed.

5. During the course of trial, on the side of the petitioner, the petitioner himself was examined as P.W.1, and Exs.P-1 to P-9 were marked, whereas, on the side of the respondents, R.Ws.1 to 5, including respondents, were examined and Exs.R-1 to R-7 marked.



CRP (NPD) No.975 of 2020

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6. The trial Court, on the basis of the evidence, both oral and documentary, and after hearing the learned counsel for the parties, dismissed the petition. Aggrieved over the same, the petitioner has filed this Civil Revision Petition.

7. Learned counsel for the petitioner would submit that the subject property, which the first respondent sought to attach before judgment, was purchased by the petitioner from the second respondent even before filing of the suit by the first respondent and, as such, the first respondent was barred from seeking for attachment of the property, which was sold by the second respondent/defendant much prior to the institution of the suit. In other words, his contention is that the petitioner and the second respondent had entered into an agreement of sale as early as on 12.08.2015 and a sale deed was executed by the second respondent in favour of the petitioner on 15.12.2015, whereas, the suit was filed by the first respondent only on 10.03.2016 and, therefore, attachment of the said property, which stood transferred in favour of the petitioner prior to the institution of the suit, was not sustainable.



CRP (NPD) No.975 of 2020

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8. Per contra, the contention of the learned counsel for the first respondent is that the trial Court had dealt with the matter *in extenso* and arrived at the correct conclusion and, hence, the order impugned does not warrant any interference.

9. Second respondent is not represented by any counsel nor has she appeared before this Court in person to contest the matter.

10. I have heard the learned counsel for the parties and also gone through the records, including the order impugned.

11. The petitioner is a third party to the suit. According to the first respondent, he lent a sum of Rs.7,50,000/- to the second respondent on 14.04.2014. He also admits that the second respondent borrowed Rs.24,50,000/- from the petitioner and that the sale agreement, dated 12.08.2015, and the sale deed, dated 15.12.2015, were executed between the petitioner and the second respondent with regard to the petition property. By virtue of the said transactions, the petition property devolved on the petitioner and possession was also handed over to him on the same



CRP (NPD) No.975 of 2020

day. The same is not disputed by the first respondent so also the second respondent. When the situation remained thus, the first respondent filed a suit O.S.No.9 of 2016 on the file of IV Additional District Court, Bhavani, Erode District, on 10.03.2016. From this, it is clear that prior to the institution of the suit, the petition property stood transferred in favour of the petitioner. Along with the suit, the first respondent also filed an interlocutory application vide I.A.No.12 of 2016 for attachment of the property before judgment, pursuant to which, the attachment was ordered by the trial Court. This Court wonders, when the petition property was standing in the name of a third party, who is the petitioner herein and not a party to either the application or the suit, how the trial Court ordered attachment of the property before judgment without verifying the veracity as to on whose name the petition property stood as on that date. It had not taken the effort to call for the records from the revenue department to ascertain the ownership of the property. It was also not bothered to verify at least the encumbrance certificate regarding the property. It just passed the order, attaching the petition property before judgment, on mere filing of an application, by closing its eyes, which is highly condemned and not sustainable. At the same time, the second respondent, against whom the



CRP (NPD) No.975 of 2020

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attachment was sought, also did not disclose the factum of sale of the property in favour of the petitioner, before the trial Court.

12. When a property is sought to be attached before judgment, the Court is bound to verify the status of the property as to in whose name the said property stands, by calling for records from the revenue department, if need be. Even otherwise, the minimum duty of the Court is to verify the status of the property from the encumbrance certificate, issued by the revenue department. In the absence of any verification thereof, the Court is not supposed to make attachment of the property before judgment, which, if made, would lead to fraudulent acts.

13. From the encumbrance certificate produced before this Court, it is seen that on 15.12.2015, the petition property was transferred by the second respondent, namely, M.Sasikala, in favour of the petitioner, namely, V.Senthil, by way of sale for a valid consideration of Rs.24,50,000/-, vide sale deed / Document No.3468/2015. Following that, on 30.12.2015, the petitioner V.Senthil mortgaged the property in favour of State Bank of India, Ammapettai Branch, towards the loan obtained by



CRP (NPD) No.975 of 2020

WEB COPY

him for a sum of Rs.21,62,000/-. At that stage, attachment of the petition property before judgment was effected on 15.04.2016 for a sum of Rs.10,06,375/-.

14. There appeared to be an active collusion between the respondents 1 and 2 to deny the title of the petitioner, by creating a fake promissory note of an earlier date and the subsequent filing of the suit by the first respondent against the second respondent for recovery of money, as the same is evident when the second respondent had concealed the factum of sale, when the first respondent sought for attachment of the said property before judgment. Non-disclosure of the sale of the petition property in favour of the petitioner by the second respondent is vital to the case.

15. The reason given by the trial Court for dismissal of the petition was that the documents produced by the respondents showed that the petition property was already attached in two other suits. On examination of this point, it is seen, that, virtually, no orders of attachment in those suits were produced before the trial Court. Without verification of the



CRP (NPD) No.975 of 2020

records as to the said alleged attachment, by mere perusal of the petitions in the interlocutory applications in I.A.No.678/2015 in O.S.No.346/2015 and I.A.No.814/2015 in O.S.No.401/2015 produced by the respondents, the trial Court came to a blind conclusion that the petition property was already attached in two other suits. Even before this Court, no orders of attachment in those suits are produced. The trial Court also went on to say that the sale agreement and the sale deed seemed to be created to defeat and defraud the lawful creditors of the second respondent. This Court is at a loss to understand how the trial Court came to such an inept understanding when the sale agreement and the sale deeds were duly registered on the file of Sub-Registrar's Office, Ammapettai, for a valid consideration. In the considered opinion of this Court, it was not sale agreement and sale deed that were created to defeat and defraud the lawful creditors of the second respondent, but it was the suit promissory note with an anterior date, that was created for the purpose, as stated supra, to defeat the rights of the petitioner. It is common knowledge that a promissory note on a plain paper for a fake consideration with an earlier date can be created for the purpose, but sale agreement and sale deed, which are registered, cannot be created to defraud a party. Therefore, the



CRP (NPD) No.975 of 2020

assumption of the trial Court in this regard also is to be deprecated. One more reason given for dismissal of the petition by the trial Court was that the fate of attachment could be decided after disposal of the insolvency petition. When the order of attachment of the petition property before judgment was passed illegally, as held by this Court hereinabove, the said reason given by the trial Court cannot be appreciated.

16. The trial Court had gone on mere surmises and conjectures to come to the conclusion, without any basis. This attitude was unbecoming on the part of the Judicial Officer, who passed the order of attachment of the petition property, and it is aspersed. It was also the *obiter dictum* of the trial Judge in the order that on the promise given by the petitioner that he would clear the entire debt of the second respondent, she executed the sale agreement and the sale deed in favour of the petitioner, which cannot also be sustained, when, actually, there is no such express promise or undertaking given by the petitioner.

17. Above all, it is significant to refer to Order 38, Rule 10 of the



CRP (NPD) No.975 of 2020

Code of Civil Procedure for effective disposal of the matter. Order 38,

Rule 10 of CPC reads as under :

O.38 R.10 : Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.- Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

18. Considering the present case on the touchstone of the above statutory provision, it is seen that the petitioner is, no doubt, a stranger and not a party to the suit. He indisputably purchased the petition property from the second respondent for a valid consideration of Rs.24,50,000/- vide sale deed / Document No.3468/2015, dated 15.12.2015, on the file of Sub-Registrar, Ammapettai. As already stated above, the order of attachment of the petition property before judgment was ordered on 07.04.2016. In this background, looked at from the above legal angle, the petitioner had got rights over the petition property even



CRP (NPD) No.975 of 2020

prior to the attachment. Therefore, the order of attachment of the property passed by the trial Court shall not affect the rights accrued in favour of the petitioner, who was not a party to the suit. Also, the second respondent had no right or title over the petition property on the date of filing of the suit by the first respondent. The attachment created unnecessary charge over the petition property, which belonged to the petitioner. Further, as stated above, the property has been mortgaged to State Bank of India, Ammapettai Branch, which is a Government of India Undertaking, for borrowal of loan by the petitioner to the tune of Rs.21,62,000/-. In the given situation, if the attachment is not lifted, the right of the Bank over the property, after lending of loan of huge sum as aforesaid, will be lost in case of failure of the petitioner to repay the loan and the said loan cannot be recovered at a later stage, thereby causing a major dent to the public exchequer, which cannot be allowed to happen. An innocent and genuine third party cannot become a victim at the hands of two colluded parties because of the wrong approach of the trial Court.



CRP (NPD) No.975 of 2020

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19. Given the above discussion, coupled with the reasons, the order impugned, dated 28.08.2019, passed in I.A.No.103 of 2016 in O.S.No.9 of 2016 on the file of IV Additional District Court, Bhavani, Erode District, is set aside and this Civil Revision Petition is allowed. No costs.

20. Since the suit was allowed and the order of attachment continued before the trial Court, now that the attachment of the petition property before judgment is lifted, it is open for the first respondent-decree holder to seek alternative remedy for recovery of suit money against the second respondent-judgment-debtor, in any, available to him under the law, such as the one under Section 51 (c) or Order 21 Rule 30 of the Code of Civil Procedure, if he is so advised.

18-07-2022

Index : Yes
Internet : Yes
Speaking Order

dixit



CRP (NPD) No.975 of 2020

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IV Additional District Judge,
Bhavani,
Erode District.



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CRP (NPD) No.975 of 2020

S.KANNAMMAL, J.

dixit

C.R.P.(NPD).No.975/2020

18-07-2022