



WEB COPY



C.M.S.A.No.28 of 2020

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED : **08.04.2022**

CORAM:

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.M.S.A.No.28 of 2020

and

C.M.P.No.11524 of 2020

Ramalingam

... Decree Holder/Appellant
Appellant

Vs.

1.Loganayaki

...Petitioner/Third Party/
1st Respondent

2.Elumalai

...Judgment Debtor/Respondent/
2nd Respondent

Prayer: Civil Miscellaneous Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 12.12.2019 in C.M.A.No.10 of 2019 on the file of the learned Principal District Judge, Villupuram, confirming the Fair and Decreetal order dated 31.08.2018 in E.A.No.35 of 2010 in E.P.No.74 of 2008 in O.S.No.78 of 2006 on the file of the Principal Subordinate Judge, Villupuram.



C.M.S.A.No.28 of 2020

For Appellant : Mr.N.Suresh

For Respondents : R1 – No Appearance
Mr.C.Prabakaran for R2

JUDGMENT

Pleading a fraudulent transfer, the appellant is before this Court.

2.The facts in brief are as follows:

The appellant who is the plaintiff in O.S.No.78 of 2006 on the file of the learned Principal Subordinate Judge, Villupuram, had filed the suit against the 2nd respondent herein for recovery of a sum of Rs.2,24,896/- together with interest @9% per annum from 04.07.2006 till the date of discharge of debt in full. The claim was made on the basis of two pro-notes dated 07.02.2003 for a sum of Rs.87,000/- and 27.02.2003 for a sum of Rs.87,000/-. The appellant would contend that despite demands, the 2nd respondent had not come forward to clear his dues. However, on 13.03.2005, the 2nd respondent paid a sum of



C.M.S.A.No.28 of 2020

Rs.1,000/- towards Principal and interest to the appellant and made an endorsement in the reverse of the pro-note dated 27.02.2003 in his own hand and on 01.04.2005, the 2nd respondent paid a sum of Rs.1,000/- to the appellant and made an endorsement in the reverse of the pro-note dated 07.02.2003 in his own hand. Thereafter, no amounts have been forthcoming which constrained the appellant to file the suit in July 2006.

3.The suit after contest was decreed on 29.02.2008. Thereafter, the appellant/Decree holder had filed E.P.No.74 of 2008 for attachment of the properties of the 1st respondent measuring an extent of 2.47 acres. On 05.06.2009, attachment was ordered in respect of all 14 items of the property. Thereafter, on 04.01.2010, the 1st respondent herein who is none other than the wife of the 2nd respondent had filed E.A.No.35 of 2010 under Order 21 Rule 58 read with Section 151 of the Code of Civil Procedure for raising the attachment.



4.It is her contention that the properties which are the subject matter of E.P.No.74 of 2008 belonged to her and therefore, the said attachment had to be raised. She would contend that Item Nos.1 and 3, and 6 to 14 were settled in the name of the 2nd respondent under a Settlement Deed dated 26.12.2005. As regards Item Nos.4 and 5, she would contend that these properties had been settled on her and as per the Settlement Deed, she had also taken possession of the same. While so, the 2nd respondent has sold the properties to one Arumugam under a Sale Deed dated 09.09.2002 which fact she came to know later and immediately, she had got the properties re-conveyed in her name on 21.10.2009. She would further contend that the 2nd respondent was not taking care of the family and the appellant herein who is a friend of her husband has a bad influence on him. She would submit that the 2nd respondent had no right, title of interest to the said property and with a malafide intention of for taking away her property the 2nd respondent colluded with the appellant and obtained the Decree and thereafter, the attachment.



C.M.S.A.No.28 of 2020

WEB COPY

5.The appellant herein had filed a counter denying the allegations and submitting that the 1st respondent is not a stranger to the 2nd respondent in as much as she is his wife. The appellant had further contended that the Settlement Deed itself has been created only after the execution of the pro-note in favour of the appellant with the sole intention of defrauding and defeating his claim under the pro-notes. The appellant would contend that the Settlement Deed is a sham and nominal one since till date the revenue records has not been mutated in the name of the 1st respondent. Further, the Sale Deed by Arumugam in favour of the 1st respondent in respect of Items 4 and 5 is after the order of attachment and the sale is not valid and the 1st respondent is not a bona fide purchaser for value. The appellant had further contended that the entire transactions had transpired with the 1st the respondent having complete knowledge about the suit, the attachment order and Decree. The transfers affected through the Sale Deed and Settlement Deed are



C.M.S.A.No.28 of 2020

all created for the purpose of depriving the decree holder the fruits of his decree.

6.The learned Principal Subordinate Judge, Villupuram by order dated 31.08.2008 proceeded to allow the petition and raised the attachment. The learned Judge proceeded on the basis that the Settlement Deed was executed much before the execution of the pro-notes and even prior to the issuance of the Legal Notice by the appellant to the 2nd respondent. The learned Judge has held that since the 1st respondent had established the possession of the suit schedule property as per the Settlement Deed, the 2nd respondent cannot be declared as the absolute owner of the properties and also the said properties are not available for attachment. Challenging the said order, the appellant herein had filed C.M.A.No.10 of 2019 on the file of the learned Principal District Judge, Villupuram. The learned Principal District Judge concurred with the order of the learned Principal Subordinate Judge, Villupuram and dismissed the appeal.



WEB COPY

7.Both the Courts have proceeded on the basis that the possession of the properties under the Settlement Deed and the Sale Deed are with the 1st respondent and therefore, the Settlement Deed has been given effect to and the properties are not available for attachment. It is challenging the concurrent orders that the appellant is before this Court.

8.Mr.N.Suresh, learned counsel appearing on behalf of the appellant would submit that the sequence of events starting from the execution of the Settlement Deed in favour of the 1st respondent and the subsequent Sale and transfers in favour of the said Arumugam, the re-conveyance to the 1st respondent would clearly establish that these transfers have been made with the sole object of defrauding the creditors. He would submit that the pro-notes were executed on 07.02.2003 and 27.02.2003 and the endorsement had been made on 13.03.2005 and 01.04.2005. The endorsement had been made



promising to pay the amounts at a later date. Thereafter on 26.12.2005, the 2nd respondent had proceeded to execute the Settlement Deed in favour of the 1st respondent and that too with reference to Item Nos. 1 to 3 and 6 to 14. He would further submit that thereafter, the properties which had been sold to the friend of the 2nd respondent one Arumugam on 09.09.2002 which was re-transferred back to the 1st respondent herein on 21.10.2009.

9.The learned counsel would further submit that one transaction which will clinchingly prove the fraud is Ex.B.1. Under Ex.B.1, the 2nd respondent has transferred the 7th item of the property to Arumugam on 15.04.2008. The 7th item of the property had been settled on the 1st respondent on 26.12.2005 itself. While so, the sale has been made by the 2nd respondent to Arumugam in respect of the very same property that he had settled on his wife. This is a clear example of fraudulent transfer. He would submit that both the Courts below had totally failed to address their attention to the fraudulent transfer. They have simply



C.M.S.A.No.28 of 2020

observed that since the transfer has been effected before the suit it is a valid one.

10.The learned counsel for the appellant would rely upon the following Judgments to support his arguments:

(1)Alamelu Ammal v. Chinnaswamy Reddiar

[CDJ 1988 MHC 161]

(2)Thulukamuthur Primary Agricultural Co-operative

Society rep. By its President v. T.K.Natarajan and another

[CDJ 2017 MHC 5861]

and

(3)K.Thirumalaivadivu v. S.Rajasekaran and another

[CDJ 2022 MHC 169].

11.The first of the Judgment has been cited in support of the arguments not only regarding the fraudulent transfer but also in support of the argument that the plea of fraudulent transfer can be taken even in



C.M.S.A.No.28 of 2020

an execution proceeding. The second of the Judgment is also with reference to a fraudulent transfer and the attachment orders being passed and the effect of such transfers on the attachment. On the similar lines, the third Judgment of the Division Bench has also been pressed into service.

12.Per contra, Mr.C.Prabakaran learned counsel for the 2nd respondent would submit that the transfers in favour of the 1st respondent by the 2nd respondent had taken place even prior to the filing of the suit O.S.No.78 of 2006. Further, the sale in favour of Arumugam had taken place on 09.09.2002 much before the execution of the pro note itself. He would therefore submit that both the Courts below has considered the objections of the appellant and thereafter, come to a conclusion that the transfers effected in favour of the 1st respondent was a valid transfer.



C.M.S.A.No.28 of 2020

WEB COPY

13. Heard the learned counsel for the appellant and the learned counsel for the 2nd respondent and perused the papers.

14. The entire gamut of the litigation rests on whether the transfer of the schedule mentioned properties in favour of the 1st respondent was with an intention to defeat the creditors, in other words, whether the transfer is hit by Section 53 of the Transfer of Property Act.

15. Section 53 of the Transfer of Property Act reads as follows:

53. *Fraudulent transfer.*— (1) *Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration. Nothing in this sub-section shall affect any law for the time being in force*



WEB COPY

relating to insolvency. A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.]”



WEB COPY

16.The Civil Miscellaneous Second Appeal was admitted on the following Substantial Questions of Law:

“a.Whether the transfer said to have taken place in favour of the 1 st respondent is a fraudulent transfer within the meaning and definition of Section 53 of the Transfer of the Property Act, when admittedly the 2nd respondent who was the husband of the 1 st respondent in order to escape from the decree had indulged in fraudulent transfer in favour of the 1 st respondent by executing a settlement deed after the execution of the promissory note? ;

and

b.Whether the courts below are right in allowing the application for raising attachment when the transfer was intended to defeat and delay the right of the creditors and therefore the same can also be avoided by



C.M.S.A.No.28 of 2020

WEB COPY

way of defence under Section 53 of the Transfer of the Property Act?”

17.The transfer of Item Nos.4 and 5 in favour of Arumugam was done on 09.09.2002. The document has not been produced for the scrutiny of the Court. Thereafter, on 07.02.2003, that is within a period of less than just four months, money is borrowed from the appellant and pro-notes are executed. On 01.04.2005 and 13.03.2005, the 2nd respondent pays a sum of Rs.1,000/- and makes an endorsement on the reverse of the pro-notes. On 26.12.2005, the 2nd respondent executes a Settlement Deed in favour of the 1st respondent, his wife in respect of Item Nos.1 to 3 and 6 to 14 in June 2006. The suit O.S.No.78 of 2006 is filed by the appellant against the respondent herein and on 29.02.2008, the suit is decreed. E.P.No.74 of 2008 is filed for attachment of the properties, namely, Item Nos.1 to 14 measuring 2.47 acres. On 15.04.2008, Item No.7 is sold by the 2nd respondent in favour of Arumugam though this property had been settled by him on the 1st



C.M.S.A.No.28 of 2020

respondent. On 05.06.2009, the properties are attached. On 21.10.2009, after the order of attachment item Nos.4 and 5 are re-transferred by Arumugam in favour of the 1st respondent. E.A.No.35 of 2010 is thereafter filed by the 1st respondent for raising attachment stating that the properties do not belong to the 2nd respondent. On 31.08.2018, E.A.No.35 of 2010 is allowed. On 12.12.2019, the appeal in C.M.A.No.10 of 2019 is dismissed and the order in E.A.No.35 of 2010 is confirmed.

18.From a perusal of these dates and events, it is seen that within four months of the alleged transfer of the items 4 and 5 of the property in favour of the 2nd respondent's friend Arumugam, the 2nd respondent has borrowed money from the appellant and executed two pro notes dated 07.02.2013 and 27.02.2013. The 2nd respondent makes an endorsement in the reverse of the pro-notes on 01.04.2005 and 13.04.2005, respectively, thereby, extending life of the pro-notes. However, in June 2006, the suit has been filed and decree on



C.M.S.A.No.28 of 2020

29.02.2008. After the Decree on 29.02.2008 and the attachment in E.P.No.74 of 2008, the properties Item Nos. 4 and 5 have been re-transferred by the said Arumugam to the 1st respondent. That apart, on 15.04.2008, the 2nd respondent has transferred Item 7 in favour of the said Arumugam. This document creates a suspicion in the mind of the Court and lends credence to the argument of the learned counsel for the appellant that the properties have been alienated only with the intention to remove the property out of the reach of the creditors. Item No.7 which is the subject matter of Ex.B.1 has been settled on the 1st respondent on 26.12.2005 itself and therefore, the 2nd respondent had no title or interest in the properties when he had sold it to Arumugam. Besides this, a perusal of Ex.B.1 – Settlement Deed would indicate that the total value of the properties settled is a sum of Rs.1,55,630/- which is slightly more than the amounts that are due to the petitioner under the pro-notes. Section 53(2) of the Transfer of Property Act clearly provides that “the transfer of the immovable properties with an intention to defraud, defeat or delay creditors is voidable at the option



of the creditor so defeated, delayed or defrauded.”

WEB COPY

19. Admittedly, the transaction in favour of the 1st respondent by the 2nd respondent is one without consideration, thereby, falling within the contours of Section 53(2) of the Transfer of Properties Act, the reasons being

(a) Item Nos.4 and 5 of the suit schedule property has been re-conveyed to the 1st respondent on 21.10.2009 after orders of attachment in E.P.No.74 of 2008,

(b) Under Ex.B.1, Item No.1 which was alleged to be settled on the 1st respondent has been sold to Arumugam on 15.02.2008 by the 2nd respondent. On the date of the sale, the 2nd respondent has not right, title or interest on the properties,

and



C.M.S.A.No.28 of 2020

(c)The revenue records have not been mutated in

WEB COPY *the name of the 1st respondent.*

20.The arguments of the learned counsel for the 1st respondent that the question of fraudulent transfer cannot be considered in execution proceedings cannot be sustained in the light of the Judgment of this Court reported in *Alamelu Ammal v. Chinnaswamy Reddiar [CDJ 1988 MHC 161]*, where the learned Judge of this Court relying upon the Judgment of the Hon'ble Supreme Court reported in **C.Abdul Shukoor Saheb vs Arji Papa Rao and others [AIR 1963 SC 1150]** and the earlier Judgment of this Court reported in **Ramaswami Chettiar v. Mallappa Reddiar [1920 AIR (Mad) 748]** has held that a transaction which is voidable under Section 53(2) of the Act can be avoided not only by filing a suit but also be raised as a defence to the proceedings under Order 21 Rule 58 read with Section 151 of the Code of Civil Procedure.



C.M.S.A.No.28 of 2020

WEB COPY

21. In fact, the facts of the case in the above referred Judgment are similar to the facts of the present case and would therefore apply on all fours to the case on hand. Therefore, the Substantial Questions of Law are answered in favour of the appellant.

Accordingly, this Civil Miscellaneous Second Appeal is allowed and the concurrent Judgments are set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

08.04.2022

Index : Yes/No
Internet : Yes/No
Speaking order / Non speaking order
mps

To

1. The Principal District Judge,
Villupuram.
2. The Principal Subordinate Judge,
Villupuram.



WEB COPY



C.M.S.A.No.28 of 2020

P.T. ASHA, J.,

mps

C.M.S.A.No.28 of 2020
and
CM.P.No.11524 of 2020

08.04.2022