



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved On : 27.10.2021
Delivered On : 19.01.2022
CORAM

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THE HONOURABLE MRS. JUSTICE R. THARANI
C.M.A.(MD)No.1084 of 2014

G.Kaliappan (Died)

1.Angammal
2.K.Thangavel
3.K.Selvam

.. Appellants/ Petitioners 2-4/
Third Party/ Third Party

Vs.

1.S.Kalimuthu
2.R.Gunasekaran

.. 1st Respondent/ 1st Respondent/
Decree Holder/ Plaintiff
.. 2nd Respondent/ 2nd Respondent/
Judgment Debtor/ Defendant

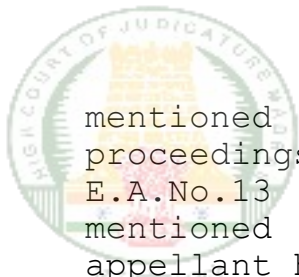
Prayer: This Civil Miscellaneous Appeal is filed under Section 43 of Rule 1 of Civil Procedure Code, to set aside the fair and decreetal order dated 06.09.2014 passed in E.A.No.13 of 2008 in E.P.No.32 of 2006 in O.S.No.252 of 2004 on the file of the learned I Additional District Judge (PCR) , Tiruchirappalli.

For Appellants : Ms.J.Anandhavalli
For 1st Respondent : Mr.V.Singan
For 2nd Respondent : Dispense with

JUDGMENT

This Civil Miscellaneous Appeal has been filed against the order passed in E.A.No.13 of 2008 in E.P.No.32 of 2006 in O.S.No.22 of 2004 on the file of the learned I Additional District Judge (PCR), Tiruchirappalli.

2.The appellants herein are third parties to the suit and the first respondent herein is the plaintiff and the second respondent herein is the defendant in the suit in O.S.No.252 of 2004. The first respondent herein has filed a suit in O.S.No.1012 of 2003 for recovery of money against the second respondent herein before the learned Sub Judge, Tiruchirappalli and later the same was transferred to the learned Additional District and Sessions Judge, Fast Track Court, Tiruchirappalli and was re-numbered as O.S.No.252 of 2004. The suit was decreed on 30.09.2005. The plaintiff has filed a petition in E.P.No.32 of 2006 for attachment of the petition



mentioned property. During the pendency of the execution proceedings, the appellant herein has filed an application in E.A.No.13 of 2008 to raise the attachment over the petition mentioned property and the same was dismissed. Against which, the appellant has come forward with this appeal.

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3.A brief substance of the application in E.A.No.13 of 2008 is as follows: 3.1. The petitioners are third parties to the suit and are the absolute owners of the schedule mentioned property. The petitioners purchased the property under a registered sale deed dated 21.10.2003. Ever since the date of purchase, the petitioners are in possession of the property. The petitioners came to know about the filing of the execution petition from the summon affixed on the outer wall of the property and came to know that the first respondent is attempting to attach the property. The first respondent attempted to attach the property at the time of trial and he has filed a petition in I.A.No.199 of 2004 and later the said petition was dismissed as not pressed. The first respondent is well aware that the property belong to this petitioners/third parties to the suit.

3.2. The petitioners have filed a petition in E.A.No.60 of 2007 on the file of the learned I Additional District Judge on 17.09.2007 questioning the right of the first respondent to proceed with the attachment. Without considering the pendency of that petition, the attachment order was passed by the Execution Court. The E.P is pending for production of sale papers. On the date of attachment on 14.11.2007, the second respondent is not the owners of the property. It is only the petitioners/third parties who are the owners of the property and they were in possession of the property on the date of attachment. The attachment is void and illegal and it has to be raised.

4.Brief substance of the counter filed by the first respondent therein is as follows:

The validity of the sale deed is denied. It is a sham and nominal transaction. The second respondent is a close friend and relative of the petitioners and they belong to the same community. The second respondent borrowed a sum of Rs.6,00,000/- (Rupees Six Lakhs only) from the first respondent and he executed a promissory note on 05.09.2001. Since the second respondent did not pay any amount to clear the debt, the first respondent filed a suit against the second respondent on 21.10.2003. He filed a petition in I.A.No.658 of 2003 seeking attachment before judgment. The second respondent entered appearance through counsel and hence, no order of attachment was passed on that date. After knowing that no order was passed, the second respondent executed the sale deed. Only to defraud payment, the second respondent had executed the alleged sale deed. The petitioners are fully aware of the loan transaction between the first respondent and the second respondent. He is well aware of the suit and the attachment petition filed by the first



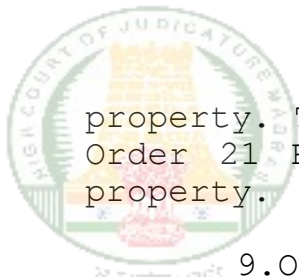
respondent. The petitioners are not bonafide transferees for consideration and the sale deed is not binding on the first respondent. The petitioners and the second respondent colluded together and shadow fight to defraud the claim of the first respondent. The requirements of Order 21 Rule 58 of CPC are not complied. The petition is to be dismissed.

5.The second respondent was set as exparte. On the side of the petitioners, two witnesses were examined and 22 documents were marked. On the side of the respondents, one witness was examined and no document was marked. After trial, the learned I Additional District Judge, Tiruchirappalli dismissed the petition. Against which, the appellant has preferred this Civil Miscellaneous Appeal.

6.On the side of the appellants, it is stated that even in the sale deed, the loan given by Rajendran and Balakrishnan were shown as subsisting liability and after the execution of the sale deed, a portion of the sale consideration was given to Rajendran and Balakrishnan and that the execution Court is wrong in disbelieving Ex.P11 and Ex.P12. The Execution Court failed to consider that there were compelling circumstances for the first respondent to sell the property. The finding of the trial Court that the appellants did not discharge the loan and that is why they could not produce the original title deed is wrong. The attachment was made only on 24.11.2007 that is long after the date of sale deed in favour of the appellants. The finding of the trial Court is perverse in deciding the sale deed as invalid just because the appellants and the second respondent belong to the same community. The second respondent has to discharge the bank loan and private loans and for discharging the said liabilities, the property was sold and the same cannot be treated as a fraudulent transaction. The first respondent did not establish that the appellants are aware of the loan transaction between the second respondent and the first respondent.

7.The earlier petition for attachment before the judgment was not pressed by the second respondent. The trial Court failed to consider the same. The first respondent is estopped from claiming attachment, as he has not pressed the earlier application. The finding of the trial Court that the sale deed was not supported by valuable consideration is erroneous. The reason assigned by the Court regarding the discharge of the loan in the UCO Bank is not maintainable.

8.On the side of the appellants, it is stated that even in the written statement filed by the second respondent, he has mentioned about the sale in favour of the appellants. Though the first respondent is fully aware of the sale transaction through the written statement, he has come forward to file the petition for attachment of the property four years after the filing of the written statement. Without considering the pendency of E.A.No.60 of 2007, the execution Court has passed an order of attachment of the



property. The appellants were forced to file E.A.No.13 of 2008 under Order 21 Rule 58 to raise the order of attachment in respect of property.

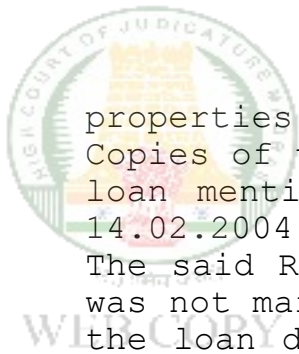
9.On the side of the appellants, it is stated that the appellants have discharged the loan mentioned in the sale deed, Ex.P11 and Ex.P12 were receipts issued by one Rajendran and Balakrishnan. The trial Court is erroneous in disbelieving Ex.P11 and Ex.P12. The appellants have discharged the bank loan and Ex.P10 is the certificate issued by the Bank. The execution Court failed to consider Ex.P10. The findings of the execution Court is biased and perverse. The observation of the trial Court that the appellants were aware of the loan transaction between the first respondent and the second respondent is wrong.

10.On the side of the appellants, it is stated that the consideration for the sale deed is to settle the loan in the UCO Bank. The trial Court failed to consider that tax for the property was paid only by the appellants. The plea of fraudulent transfer is not applicable to the facts of the case. The sale consideration to settle other loan transactions cannot be a ground to disbelieve the sale deed. No suit notice was issued to the first respondent by the second respondent. The sale deed is valid and non discharge of loan will not amount to a fraudulent transaction. Even after the filing of the written statement, the first respondent failed to implead the appellants as parties to the proceedings. The trial Court failed to appreciate the evidence of P.W.2. Non mentioning of the discharge of loan in the income tax returns is not a valid ground, since discharge was done subsequently.

11.On the side of the respondents, it is stated that the judgment debtor remained exparte and the first respondent is the decree holder. The original sale deed was not filed by the petitioner and the copy of the sale deed was marked as ExP7. The first respondent filed a suit on 21.10.2003 and on the same date, I.A.No.658 of 2003 for attachment of the property before the judgment was filed and on the same date, the second respondent entered appearance through his counsel. On the same date, the second respondent sold the property. This will indicate the knowledge of the second respondent regarding the petition for attachment of the property. The first petitioner is a relative of the second respondent. The alleged sale deed is not supported by consideration. The alleged consideration is to discharge the following debts:

- | | |
|--|-----------------|
| (i)To discharge a loan due to UCO Bank | - Rs.8,00,000/- |
| (ii)To discharge a loan due to Rajendran | - Rs.3,00,000/- |
| (iii)To discharge a loan due to Balakrishnan | - Rs.2,00,000/- |

12.P.W.1 has admitted that he was not in possession of Rs.13,00,000/- on the date of purchase. He has admitted that even for purchasing stamp papers, he borrowed a sum of Rs.1,25,000/-. P.W.2 has admitted in his evidence that he sold some of his other



properties and with the sale proceeds, he discharged the loans. Copies of the sale deeds were not filed before the Court. The second loan mentioned in Ex.P7 was said to have been discharged only on 14.02.2004. The loan mentioned in Ex.P7 are bogus and fictitious. The said Rajendran was not examined. The discharged promissory note was not marked as a document. Ex.P22 income tax return reveals that the loan due to Rajendran is a subsisting liability. The discharge of the loan to Rajendran dated 14.02.2004 was not mentioned in the income tax return.

13.The petitioner is claiming that he discharged the loan to one Balakrishnan on 08.03.2005 under Ex.P12. The said Balakrishnan was not examined. The account maintained by P.W.2 were not produced before the Court. The claim petition was filed by the first petitioner only on 14.12.2007 long after the execution of Ex.P11 and Ex.P12. But those documents were not filed along with the claim petition.

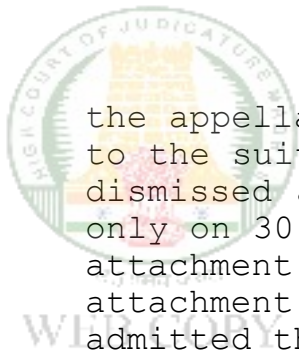
14.Ex.P8 to Ex.P10 are documents relating to the discharge of the first loan that is due to the UCO Bank. Ex.P10 does not give any indication whether the loan was discharged by the petitioners. The original document of title ought to have been returned to the petitioner but those documents were not marked. The original of Ex.P7, sale deed was deposited as security for a loan of Rs.4,00,000/- with one Subramanian and that loan was not discharged till date. There is no possibility for the petitioner, who is already having a loan to have discharged the loan due to be paid by his seller. P.W.1 in his evidence has admitted that on the date of sale, the second respondent was unable to discharge the loan. P.W.1 and P.W.2 have admitted that they belong to the same community. The loan mentioned in the sale deeds are sham and nominal. In support of this contention, a judgment of the Hon'ble Supreme Court in the case of **Abdul Shukoor Saheb v. Arji Papa Rao and others** reported in **1963 AIR 1150 SC** is cited.

15.The learned counsel for the first respondent would rely upon a judgment of the Court in the case of **V.P.S.Viswanathan v. Sri Raja Yarns Traders** reported in **2010 (1) MLJ 556**.

16.The learned counsel for the first respondent would rely upon a judgment of the Court in the case of **Arya Engineering v. Corporation Bank and three others** reported in **1997 (2) CTC 83**.

17.The learned counsel for the first respondent would rely upon a judgment of the Court in the case of **Uma v. Salem Sowdambiga Finance Others** reported in **2009 (1) Law Weekly 730**.

18.The suit was filed on 20.10.2003 and the sale deed was registered on 21.10.2003. On the date of sale, no attachment order was pending. Though the written statement was filed on 31.03.2004,



the appellants have not chosen to implead the petitioners as parties to the suit. The attachment petition filed along with the plaint was dismissed as not pressed. The present attachment petition was filed only on 30.01.2006. Only after four years from the date of sale, the attachment petition was filed by the first respondent. The attachment order was passed on 14.11.2007. R.W.1 in his evidence has admitted that the appellants were not aware of the loan transaction.

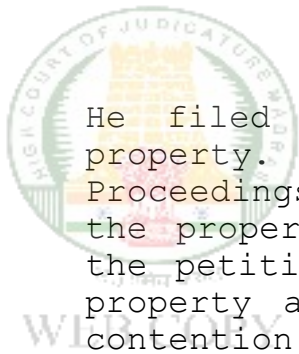
19.On the side of the appellants, it is stated that the execution Court failed to consider Ex.P10 to Ex.P12 and that there was no attachment before judgment on the date of purchase. The trial Court failed to consider that the sale consideration was paid by the appellants and the trial Court failed to consider that the sale is for valuable consideration and on the date of attachment of the property, the property stand in the name of the appellants and not in the name of the second respondent and prayed the order of the trial Court to be set aside. In support of this contention, a judgment of this Court in the case of **Pinna Thevar v. M.S.Maniam and other** reported in **2006 5 CTC 245** is cited.

20.The learned counsel for the appellants would rely upon another judgment of this Court in the case of **Ammavasai v. Tulasikannu and others** in **C.M.S.A. (MD)No.6 of 2008**.

21.On the side of the first respondent, it is stated that the appellants are not bonafide purchasers. On the date of filing of the suit itself, a petition for attachment before the judgment was filed. The counsel for the defendant was present and he prayed time for filing counter. The second respondent was aware of the filing of the suit on the date of filing itself. Only to defraud the first respondent, the second defendant has executed the sale deed on the next date from the date of filing of the suit. No sale consideration was paid. Only a loan pending in the UCO Bank and two other private loans were mentioned as sale considerations. The loan document for discharge of the loan was not filed. The payment of consideration was not proved. The transaction is a fraudulent transaction and the sale is a void one and prayed the appeal to be dismissed.

22.A perusal of the records reveals that on 20.10.2003, the original suit was filed by the first respondent against the second respondent. It is stated that on the same date itself, an attachment petition was filed and on the same date, a counsel appeared for the second respondent and he seek time for filing counter in the attachment petition.

23.It is seen that a petition for attachment before judgment in I.A.No.658 of 2003 in O.S.No.252 of 2004 filed before the Sub Court, Tiruchirappalli was dismissed as not pressed. The suit was decreed in favour of the first respondent. The first respondent filed a petition in E.P.No.32 of 2006 for execution of the decree.



He filed a petition for attachment of the property mentioned in the petition. It is stated that the appellants are aware of the E.P. Proceedings, only when the summons was pasted on the outer wall of the property. The appellants approached the trial Court and filed the petition questioning the right of the plaintiff to attach the property and that petition in E.A.No.60 of 2007 is pending. The contention of the appellants is that the appellants are not aware of the loan transaction or the decree and that there was no attachment on the date of the purchase of the suit property. The execution Court came to a conclusion that the sale deed is not valid, since the appellants purchased the property during the pendency of the case.

24.Though in the written statement, the second respondent has stated that the property was sold to the appellants, the first respondent did not take any action to implead the appellants as parties to the suit. The appellants have produced documents to prove that sale consideration was paid by them. Ex.P10 is the letter issued by the UCO Bank and Ex.P11 and Ex.P12, are receipts for the settlement of the loans borrowed by the second respondent from one Rajendran and from one Balakrishnan.

25.The property stands in the name of the appellants. Property tax receipts were marked as Ex.P2 to Ex.P4, water charge receipts were marked as Ex.P13 and Ex.P17, property tax receipts were marked as Ex.P14 to Ex.P16, name transfer documents were marked as Ex.P19 to Ex.P21. From Ex.P1 to Ex.P4, Ex.P13 to Ex.P17, it is clear that the property stand in the name of appellants and is in possession of the appellants. On the date of attachment, the property was not in the name of the defendant in the suit. Before deciding the claim petition, without verifying the ownership on the date of attachment, the trial Court has erroneously passed an order of attachment. The suit was not filed for declaration of title. The suit is only a money suit. The pendency of a money suit can not affect the sale of a property. E.A.No.60 of 2007 is pending.

26.In the above circumstances, the order passed by the execution Court in E.A.No.13 of 2008 in E.P.No.32 of 2006 in O.S.No.252 of 2004 before the learned I Additional District Judge (PCR) , Tiruchirappalli is set aside and the attachment of the property in E.A.No.13 of 2008 raised and hence, the Civil Miscellaneous Appeal is allowed. No Costs.

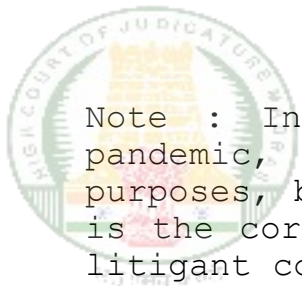
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Assistant Registrar (P&A)

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Sub Assistant Registrar(CS)



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1.The I Additional District Judge (PCR), Tiruchirappalli.

copy to:

The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.J.ANANDHAVALLI, Advocate (SR-1751[F] dated 19/01/2022)

C.M.A. (MD)No.1084 of 2014
19.01.2022

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