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C.M.A.No.1856 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.10.2023

CORAM :

THE HONOURABLE MR. JUSTICE M. DHANDAPANI

C.M.A.No.1856 of 2007

1.P.Pandurangan (Died)

2.P.Shanthi

3.P.Vengatesan

4.P.Ilangovan

5.P.Malarvannan

6.P.Sudhakaren

7.E.Govindammal

8.P.Mottoucoumaran

[A2 to A8 are brought on record as LR's of the deceased

sole appellant viz., P.Pandurangan vide order dated

06.10.2023 made in C.M.P.Nos.4768 & 4765 of 2021

in C.M.A.No.1856 of 2007]

... Appellants

Vs.

1.Nadanasabapathy @ Muthulingam

2.Rajendiran

3.Ramani

4.P.Nadarajan

5.Ganesan

6.A.Balamurugan

7.Leon Mary

8.N.Madurai

9.A.Sadasivam

10.A.D.M.Zhones

... Respondents



C.M.A.No.1856 of 2007

Prayer : Civil Miscellaneous Appeal filed under Order 43 Section 115 of the Code of Civil Procedure, 1908, against the order and decree dated 27.08.1998 made in E.A.No.118 of 1994 in E.P.No.123 of 1993 in O.S.No.194 of 1991 on the file of the Principal Subordinate Judge of Pondicherry.

For Appellant : Ms.G.Sumitra

For Respondents : Mr.Sunnysheen
for M/s.V.Srimathi for RR-1, 3, 6 to 9
No appearance for RR-4 & 10
Notice dispensed with for RR-2 & 5

JUDGMENT

Challenging the order and decree dated 27.08.19998 made in E.A.No.118 of 1994 in E.P.No.123 of 1993 in O.S.No.194 of 1991 on the file of the Principal Subordinate Judge, Pondicherry, the present civil miscellaneous appeal is filed.

2. Since the respondents 2 and 5 are not necessary parties in this appeal, notice to the respondents 2 and 5 is dispensed with.



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3. The first appellant herein is the decree holder and he filed a suit in O.S.No.194 of 1991 against the 10th respondent herein/judgment debtor for recovery of Rs.1,36,240/- with subsequent interest and cost due under the promissory note dated 05.02.1991 executed by the judgment debtor. Along with the suit, a petition for attachment before judgment in I.A.No.1397 of 1991 in O.S.No.194 of 1991 for attachment of the immovable properties of the judgment debtor was filed and the judgment debtor was called by the lower court to furnish security bond for the suit claim. The judgment debtor has furnished defective and incomplete security bond and he also made an endorsement in the ABJ petition in I.A.No.1397 of 1991 that he will not dispose of the E.P. mentioned properties till the security bond is accepted by the lower court, thereby an order was passed on 19.11.1991 as per the undertaking given by the judgment debtor. On 19.11.1991, the judgment debtor had not furnished any security, hence, the attachment before judgment of the E.P. schedule of properties was ordered by the lower court on 06.03.1992 in I.A.No.1397 of 1991 in O.S.No.194 of 1991. Pursuant to the said order, properties were also attached by the lower court with the help of amin and local karnam on 26.03.1992 with beating of tom-tom and the



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descriptions of attached immovable properties were also affixed in the property and also in conspicuous place of the court hall and in other places also. The attachment was duly intimated to the judgment debtor and further, the attachment was made absolute on 24.03.1992 and no appeal was preferred.

4. Pursuant to the absolute attachment, the lower court also communicated to the Registrar Office, Puducherry for entering encumbrance in Volume No.983 in page No.249 in No.C.13/92. Thereafter, the suit was decreed on merits on 07.10.1993 and no appeal was preferred by the judgment debtor. However, in order to defeat the rights of the appellant, the judgment debtor and his brother Jayabalan executed a power of attorney in favour of one Leon Mary/7th respondent herein, and from the said respondent, the third party claimants have purchased the properties for valuable sale consideration on 27.04.1993 and 23.07.1993 respectively. However, the said decreetal order was not complied with, thereby the appellant filed E.P.No.123 of 1993 in O.S.No.194 of 1991, in which E.A.No.118 of 1994 was filed for adjudicating the claim of the third party claimants and release the



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properties from attachment. Inspite of the order of attachment, the lower court allowed the application filed by the respective respondent/subsequent purchaser. Challenging the same, the present appeal is filed.

5. The learned counsel appearing for the appellants submitted that attachment before judgment, order was passed in I.A.No.1397 of 1991 on 06.03.1992, thereafter the same was made absolute on 24.03.1993. After making absolute the attachment was communicated to the judgment debtor and the same was registered at the Registrar Office, Puducherry in Volume No.983 in page No.249 in No.C.13/92 and the mandatory procedure required under Order 38 Rule 11B, however, the same was not properly considered by the lower court and released the attachment in favour of the judgment debtor, which is not sustainable. Accordingly, he prays for allowing the appeal.

6. Per contra, the learned counsel appearing for the respondents 1, 3, 6 to 9 submitted that the respective respondents are innocent purchasers. They purchased the properties without knowing the



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attachment made by the lower court in respect of the properties purchased by them and though the mandatory procedure under Order 38 Rule 11B is said to have been followed in the present case but the same is not reflected in the encumbrance certificate, which prevailed upon the respective respondents to purchase the properties from the power of attorney of the owner of the properties, namely the judgment debtor and his brother Jayabalan. Therefore, for no fault of the subsequent purchasers, they cannot be put to hardship and, therefore, the said issue was elaborately considered by the lower court and allowed the application filed by them, which cannot be interfered with. Accordingly, he prays for dismissal of the appeal.

7. Heard the learned counsel appearing for the appellants and the learned counsel appearing on behalf of the respondents 1, 3, 6 and 9 and perused the materials available on record.

8. There could be no quarrel with the fact that the order of attachment before judgment was passed on in I.A.No.1397 of 1991 on 06.03.1992, thereafter the same was made absolute on 24.03.1993. After



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making absolute the attachment was communicated to the judgment debtor and the same was registered at the Registrar Office, Puducherry in Volume No.983 in page No.249 in No.C.13/92. It is not the case of the 10th respondent, viz., the judgment debtor that he was not aware of the order of attachment before judgment. Further, it is to be pointed out that the order of attachment before judgment had also been made absolute and necessary intimation had also been sent to the Registrar Office, Pondicherry.

9. In spite of the fact that the 10th respondent was within the thick of things, with knowledge about the attachment before judgment, the 10th respondent has not appeared before this Court either through counsel or in person. Knowing very well about the fact that there is an order of attachment even as early as on 06.03.1992, when the order of attachment was passed, against the said property, the 10th respondent had entered into a power of attorney with the 7th respondent along with his brother in relation to the property in question, which has been subsequently sold during April, 1993 and July 1993. The knowledge of the 10th respondent about the attachment on the property clearly shows that only with an



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ulterior motive, the power of attorney has been given in favour of the 7th respondent, who had since alienated the property in favour of third parties, which is a clear action on the part of the 10th respondent to defeat the legitimate rights of the appellants herein.

10. It is not in dispute that the order of attachment was duly intimated to the judgment debtor and further, the attachment was made absolute on 24.03.1992 and no appeal was preferred. Pursuant to the absolute attachment, the lower court also communicated to the Registrar Office, Puducherry for entering encumbrance in Volume No.983 in page No.249 in No.C.13/92. Thereafter, the suit was decreed on merits on 07.10.1993 and no appeal was preferred by the judgment debtor.

11. When the judgment debtor/10th respondent had complete knowledge about the attachment, the act of the 10th respondent in executing the power of attorney, which resulted in the subsequent sale of the property in favour of third parties is nothing but a clear act of contempt, which has been perpetrated by the 10th respondent to defeat the rights of the appellants.



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12. Order 38 Rule 11 B stipulates that where any order of attachment is passed under rule 5 or and any order raising the attachment passed under rule 9 the same shall be communicated to the registering officer within the local limits of whose jurisdictions the whole or any part of the immovable property completed in such Order, is situated.

13. It is the specific case of the appellants that Order 38 Rule 11B has been complied with and the Registering Authority had been duly informed about the order of attachment. The 10th respondent has not disputed that there is no compliance of Order 38 Rule 11B. It is only the subsequent purchasers, who claim that there is no compliance of Order 38 Rule 11B CPC. Merely because nothing reflected in the encumbrance, as alleged by the respondents cannot be a ground to hold that there is no compliance of the mandatory conditions under Order 38 Rule 11B CPC. When there is no denial by the judgment debtor with regard to the compliance of Order 38 Rule 11B, the subsequent purchasers step into the shoes of the judgment debtor and they cannot claim that there is no compliance of the mandatory condition. The subsequent purchasers have



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to rise or fall on the basis of the case of the judgment debtor and they cannot have a better pleading than the judgment debtor, when there is a clear order of attachment on the said property way back even before the sale of the property by the 7th respondent/power of attorney in favour of the subsequent purchasers. Therefore, what is applicable to the judgment debtor is applicable to respondents 2 and 5, who claim to be subsequent purchasers.

14. Without properly appreciating the aforesaid legal provision, more specifically Order 38 Rule 11B CPC, the court below had erred in allowing E.A.No.118 of 1994 in E.P.No.123 of 1993 in O.S.No.194 of 1991, filed by the subsequent purchasers, when there was an order of attachment of the property culminating in the compliance of the provisions of Order 38 Rule 11B CPC. In such view of the matter, the order passed by the court below in the execution application is wholly and grossly erroneous and, accordingly, the same deserves to be set aside.

15. For the reasons aforesaid, this civil miscellaneous appeal is



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allowed setting aside the order dated 27.08.1998 passed in E.A. No.118 of 1994 in E.P.No.123 of 1993 in O.S.No.194 of 1991. In the circumstances of the case, there shall be no order as to costs.

18.10.2023

Index : Yes / No

Speaking order / Nonspeaking order

Netrual Citation Case : Yes / No

sp

To

- 1.The Principal Subordinate Judge of Pondicherry.
- 2.The Section Officer, V.R.Section, High Court, Madras.



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M.DHANDAPANI, J.

sp

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