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C.M.S.A.No.53 of 2003

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.09.2023

CORAM :

THE HONOURABLE MR. JUSTICE P. VELMURUGAN

Civil Miscellaneous Second Appeal No. 53 of 2003
and
C.M.P.No. 20243 of 2003

Kuppan

.. Appellant

Versus

- 1.Rukumani Ammal (Died)
Gopal Reddiar (died)
- 2.Uma Rani
- 3.Venkatesan
- 4.Vasumathi
- 5.Varalakshmi
- 6.Thilagavathi
- 7.Chandrasekar
- 8.Natarajan
- 9.Abirami
- 10.Jeeva
- 11.Senthil

... Respondents

[RR6 to R11 brought on record as L.R's of the
deceased R1 vide order dated 09.01.2019 in
C.M.P.No.11809 to 11811 of 2017 in
C.M.S.A.No.53 of 2003]

Civil Miscellaneous Second Appeal filed under Section 100 of
Civil Procedure Code to set aside the judgment and decree dated 09.05.2003 in
A.S. No. 20 of 2002 on the file of the Additional District Court, Fast Track



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Court-II, Tindivanam dismissing the judgment against the order dated 04.07.1997 in E.A. No. 329 of 1996 in O.S. No. 42 of 1988 on the file of the Principal District Munsif Court, Tindivanam.

For Appellant : Mr. R.Venkatesulu
For Respondent : R1 – Died
No appearance for R2 to R11

JUDGMENT

This appeal has been preferred against the judgment and decree dated 09.05.2003 passed in A.S. No. 20 of 2002 on the file of the Additional District Court, Fast Track Court-II, Tindivanam, confirming the judgment dated 04.07.1997 made in E.A. No. 329 of 1996 in O.S. No. 42 of 1988 on the file of the Principal District Munsif Court, Tindivanam.

2. According to the appellant, the land in S.No.243/1 to the extent of 2 acres and 99 cents originally belongs one Mannar Reddy and Mohan Reddy, who are the brothers of Gopal Reddiar. As per the Koorchit, the first item of the property belonged to Mannar Reddiar, second item belonged to Mohan Reddy and one portion of the third item was vested with the Gopal Reddiar. While so, one Rukmaniammal filed a suit in O.S. No. 42 of 1988 for recovery of money against Gopal Reddiar and she had got an *ex-parte* decree on 17.6.1988. Thereafter, she filed E.P. No. 504 of 1995 on the file of the Subordinate Court, Tindivanam, for execution of the decree and brought



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the petition mentioned property for sale in which the son of the decree holder has purchased the said property in public auction. As per the Koorchit, the judgment debtor/Gopal Reddiar had got only 1/3rd share in the entire extent of 2 acres 99 cents. The appellant herein has purchased 2/3rd share of the said property from the sons of Mannar Reddy and Mohan Reddy under a registered sale deed on 02.08.1995 for a valuable consideration. However, the decree holder brought into the auction the entire extent of 2 acres 99 cents. Hence, the appellant has filed an application before the Execution Court in E.A. No. 329 of 1996 under Order XXI Rule 58(1) of Code of Civil Procedure claiming right and title over 2/3rd share in the said property. The Execution Application was dismissed against which he preferred an appeal in A.S. No. 20 of 2002 before the learned Additional District and Sessions Judge, Tindivanam and the same was dismissed under the impression that sale was already confirmed on 02.05.1988, itself. Therefore, the appellant herein is before this Court by way of this Civil Miscellaneous Second Appeal.

3. Heard the learned counsel for the appellant and perused the materials available on record.

4. The first respondent-Rukumani Ammal died and her legal representatives were added as respondents 6 to 11 in this appeal. Though



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notice has been served on respondents 2, 3, 4, 5, 7, 8, 10 and 11, there is no representation for them either in person or through counsel. Further, it is stated that as against the sixth and ninth respondents herein, though substituted service by way of newspaper publication was made, none appeared for them.

5. It is seen from the records, this appeal was admitted in the year 2004 and the same is pending without formulating any substantial question of law. Based on the materials, today, this Court formulates the following substantial question of law :

" Whether the courts below did not err in adversely commenting about the alleged delay in filing the claim petition when the petitioner had actually intervened with a claim as soon as he had knowledge about the court auction sale and his entitlement to the property on the basis of title could not be whittled away by the so called delay."

6. The learned counsel for the appellant submitted that the appellant purchased the said properties on 02.08.1995 and from that date onwards, he is in possession of the property. While so, the first respondent (since dead) obtained an *ex-parte* decree against one Gopal Reddiar, who had got only 1/3rd share in the entire extent of 2 acres 99 cents, however, the decree



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holder brought into the auction the entire extent of the property. He further submitted that the first respondent/decreed holder, at the time of filing of the suit, got an order of attachment before the judgment for the entire extent of the property. However, the said attachment was not effected under Order XXXVIII Rule 11(b) C.P.C. Originally, the order of attachment was not sent to the Registrar Office and the same was not entered in the proper register and hence, it does not reflect in the Encumbrance Certificate. Therefore, the appellant was not aware of the decree or order of attachment including the filing of the Execution Petition before purchase. However, only after purchase, when attempts were made to take delivery of the property, he came to know about the same and therefore, he filed an application in E.A. No. 329 of 1996. He further submitted that the appellant has established his right and title over $2/3^{\text{rd}}$ share in the entire extent of 2 acres and 99 cents. As the judgment debtor/Gopal Reddiar is entitled for only $1/3^{\text{rd}}$ share, the decreed holder cannot attach more than the share of Gopal Reddiar. He further submitted that the Execution Court failed to appreciate the above facts and dismissed the petition. When he moved the appellate Court, the appellate Court also wrongly held that the auction sale was effected and confirmed even on 02.05.1988, itself and the appellant has approached the Court very belatedly. He further submitted that on 02.05.1988, only the attachment before



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the judgment was ordered The delivery of the property has not been taken and the Execution Petition itself is still pending. Therefore, the appellant has filed execution Application under Order XXI Rule 58 C.P.C stating that he has got interest over 2/3rd share of the property.

7. The learned counsel for the appellant further submitted that in the total extent of 2 acres 99 cents in S.No.243/1, Gopal Reddiar has got only 1/3rd share and the remaining property i.e., 2/3rd share belongs to the appellant, who purchased it from the sons of Mannar Reddy and Mohan Reddy. However, the decree holder wrongly attached the entire property without complying with the provisions under Order XXXVIII Rule 11 (b) C.P.C. Therefore, the orders passed by the courts below are contrary to facts and law. The Appellate Court has erroneously found that the auction sale was confirmed on 02.05.1988 itself, but it had lost sight of the fact that delivery has not been taken.

8. When this appeal was taken up for hearing on 25.8.2023, this Court called for a report from the Principal Subordinate Judge, Tindivanam, as to whether the Execution Petition is pending or not. The Principal Subordinate Judge, Tindivanam submitted a report dated 04.09.2023. On a perusal of the report, it is seen that E.P. No. 504 of 1995 is still pending on the file of the



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Additional District Munsif Court, Tindivanam. It is also evident that EA No. 57 of 2021 filed under Section 146 C.P.C and E.A. No. 72 of 2021, which was filed under Order XXI Rule 89 C.P.C are also pending. Therefore, it clearly shows that, so far sale has not been confirmed in favour of the auction purchaser and delivery of the property has not been handed over. Further, this Court vide order dated 06.02.2004 stayed the execution proceedings in O.S. No. 42 of 1988 on the file of the Principal District Munsif Court, Tindivanam and therefore also, the Execution Proceedings could not have been completed so far.

9. The facts remain that Execution Petition is still pending and the sale has not been confirmed in favour of the auction purchaser. Unless the sale is confirmed, there is no question of filing the petition to set aside the sale within 30 days. While so, the appellate Court erroneously held that sale was confirmed on 02.05.1988 and dismissed the appeal preferred by the appellant herein.

10. Though this Court, is not a final Court of fact finding cannot sit in the arm chair of the Appellate Court and re-appreciate the factual aspects. However, this Court has to see whether factual aspects leads to an erroneous conclusion on the part of the Courts below, which would give rise to



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the appellant to file the instant appeal and by raising the substantial question of law.

11. On a perusal of the records and the report of the learned Principal Subordinate Judge, Tindivanam dated 04.09.2023, it would reveal that E.P. No. 504 of 1995 is still pending and the sale has not been confirmed, till date. Therefore, the judgement of the Appellate Court is erroneous and accordingly, the substantial question of law is answered accordingly.

12. Since the Execution Petition itself is pending adjudication besides E.A. No. 57 of 2021 and E.A. No. 72 of 2021 are also pending on the file of the Additional District Munsif Court, Tindivanam, the Execution Court is directed to decide the application filed under Order XXI Rule 58 (1) C.P.C afresh by taking note of the fact that the appellant has purchased the property way back on 02.8.1995, itself and attachment was effected before judgment dated 02.05.1988. Since the provisions contained under Order XXXVIII Rule 11(b) was not duly complied with, the attachment of the property itself has not been given any effect against the appellant. Further, so far the sale has not been confirmed. However, the legal representatives of respondent/judgment debtor are at liberty to proceed with the Execution Petition in respect of 1/3rd



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share instead of the entire extent of the property measuring 2 acres and 99 cents.

13. In light of the above facts and circumstances, this Civil Miscellaneous Second Appeal is allowed and the order passed in A.S. No. 20 of 2002 in E.A. No. 329 of 1996 in O.S. No. 42 of 1988 on the file of the Additional District Court, Fast Track Court-II, Tindivanam is hereby set aside. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

05.09.2023

Index: Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes/No
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To

- 1.The Additional District Court,
Fast Track Court -II
Tindivanam.
- 2.The Principal District Munsif Court,
Tindivanam.
- 3.The Section Officer,
V.R.Section,
High Court, Madras.



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P.VELMURUGAN, J.

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