



S.A.No.176 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2023

CORAM

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.176 of 2018
and C.M.P.No.4498 of 2018

Radhakrishnan

... Appellant

vs.

1.S.Pugazendi

2.S.Prabu

... Respondents

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and the decree dated 07.03.2017 in A.S.No.15 of 2014 on the file of the I Additional Sub Court, Villupuram, confirming the judgment and the decree dated 14.02.2014 in O.S.No.472 of 2008 on the file of Additional District Munsif's Court, Villupuram.

For Appellant : M/s.R.Meenal

For Respondents : Mr.S.Krishnasamy

J U D G E M E N T

The plaintiff in the suit is the appellant. He filed a suit for declaration of title and permanent injunction restraining the respondents from interfering with his peaceful possession and enjoyment of the suit property. The suit was dismissed by the Trial Court and the first appeal filed by the



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appellant was also dismissed. Aggrieved by the concurrent findings, the appellant is before this Court.

2. According to the appellant/plaintiff, the suit property was originally allotted to the share of respondents' father Subramaniyan under the Partition Deed dated 05.12.1986 between the said Subramaniyan and respondents/defendants. The said Subramaniyan sold 0.20 cents out of 1 acre 39 cents in Dry Survey No.4/2 in favour of the appellant/plaintiff under registered Sale Deed dated 09.02.1991 and as such, the appellant/plaintiff has been possession and enjoyment of the same from that date onwards. One Sendamaraikannan filed an execution petition in E.P.No.465 of 1991 against the said Subramaniyan for attachment of the properties and he said to have caused an attachment on 15.11.1991, which was subsequent to the sale effected in favour of the appellant. Thus, the appellant's Vendor-Subramaniyan had no subsisting interest on the date of alleged attachment. Hence, the appellant filed a claim petition in E.A.No.905 of 1993 in E.P.No.465 of 1991 to raise attachment. The appellant was examined on his side and the matter was adjourned for evidence of respondents' therein. The learned counsel, who represented the appellant in claim petition told him



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that he would intimate the result after disposal of the said petition.

However, the result of the claim petition was not informed to the appellant.

In these circumstances, the 2nd defendant attempted to commit trespass into the suit property on the ground they had purchased the suit property from his paternal uncle Palani. Thereafter, on enquiry the appellant came to know that claim petition filed by him in E.A.No.905 of 1993 was dismissed for default. The above said Palani, who was brother of Subramaniyan and junior paternal uncle of defendants said to have been purchased the suit property in court auction sale on 18.06.1998 and said Palani had also taken delivery of the suit property through court. It was further claimed by the appellant that delivery effected in favour of the Palani was only a paper delivery and he had been possession and enjoyment of the suit property. Claiming that the execution proceedings was collusive one and vitiated by fraud, the appellant has filed the present suit seeking above said relief.

3. The respondents herein filed a written statement denying right as well as possession over the suit property. It was averred by the respondents that one Senthamaraikannan filed a suit for recovery of money against the Subramaniyan in O.S.No.477 of 1988 and obtained a decree. The suit



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property, which was attached in the proceedings initiated by Senthamaraikannan was brought for sale. The appellant filed claim petition in E.A.No.905 of 1993 on 16.03.1993. The said petition was taken up for enquiry on 15.11.1993 and appellant was examined as PW.1 on 06.12.1993. Thereafter, the said Subramaniyan died and his legal representatives were brought on record. Subsequently, the appellant filed application to reopen the evidence and recall him. Those applications were allowed and again, the matter was posted for appellant's side evidence on 18.07.1996 and the appellant's side evidence was closed on 08.09.1997. Thereafter, the matter was posted for respondents' side evidence on 17.09.1997. On that date, the appellant's counsel, who represented the appellant in the claim petition reported no instructions and therefore, the claim petition was dismissed for default on 17.09.1997. Subsequently, the suit property was sold in court auction sale to one Palani on 18.06.1998 and the sale was confirmed on 24.08.1998. The court auction purchaser had taken delivery of the property through Court on 14.06.1999. The patta for the suit property was also transferred in his name and he had been enjoying the suit property by paying kist. Subsequently, the suit property was sold by Palani to the respondents by a registered Sale Deed dated 04.12.2006. Thus, the respondents sought



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for dismissal of the suit by claiming title under court auction purchaser-
Palani.

4. The Trial Court on consideration of evidence available on record, came to the conclusion that the present suit filed by appellant was barred by Order XXI Rule 58(2) of the Civil Procedure Code and consequently, dismissed the suit. Aggrieved by the same, the appellant preferred an appeal in A.S.No.15 of 2014 on the file of I Additional Subordinate Court, Villupuram. The First Appellate Court also concurred with the findings of Trial Court. Aggrieved by the same, the appellant is before this Court.

5. The learned counsel appearing for the appellant submitted that the claim petition filed by appellant was not dismissed on merits and the same was dismissed only for default of the appellant. In such circumstances, the suit filed by the appellant for declaration of title and permanent injunction is very well maintainable. The learned counsel further submitted that the sale in favour of the appellant was prior to the attachment made in the proceedings initiated by Sendamaraikannan against Subramaniyan, predecessor-in-interest of the respondents. Therefore, the appellant is



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entitled to maintain the suit for declaration of his title independent of dismissal of his claim petition.

6. It is seen from the pleadings of the parties especially the plaintiff's averment of the appellant, he filed claim petition for raising of attachment by asserting his title over the suit property. In the said claim petition, he was examined as PW.1 and after closure of evidence on his side, the matter was posted for respondents' side evidence. At that juncture, the application said to have been dismissed for default of the appellant. The Courts below on the basis of Ex.A13-certified copy of petition and order in claim petition filed by the appellant, came to the conclusion that the claim petition was dismissed for default owing to absence of appellant herein. When the appellant's side evidence was closed and the matter was posted for evidence of respondent's therein and appellant failed to appear even though the respondents were ready to examine their witnesses, the dismissal of the claim petition should be treated as one under Order IX Rule 8 of the Civil Procedure Code.



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7. It is settled law that adjudication in a claim petition is not summary

in nature and the same should be treated as adjudication in a regular suit.

Therefore, there is no difficulty in coming to the conclusion that the provisions of Order IX of Civil Procedure Code is applicable to the claim petition. When claim petition is dismissed for default of the appellant under Order IX Rule 8 of Civil Procedure Code, the bar under Order IX Rule 9 of the Civil Procedure Code is applicable and the appellant is precluded from filing separate suit and only option open to him is to file a petition to restore claim petition. Even otherwise there is an embargo on the right of the appellant from filing a separate suit for declaration of title under Order XXI Rule 58(2) of the Civil Procedure Code. The relevant rule reads as follows:-

“Order XXI Rule 58(2):- All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.”

8. A reading of above rule would make it clear all questions including



questions relating to right, title or interest in the property attached arising between the parties in a proceedings or their representatives shall be determined by the Court dealing with the claim or objection and not by a separate suit. In the case on hand, rightly appellant filed claim petition, examined his witnesses, when the matter was posted for examination of respondents' side witnesses in claim petition, he failed to appear and claim petition was dismissed for default. The same was dismissed for default on 17.09.1997. After 11 years, the present suit has been laid for declaration of title. Hence, the instant suit filed by the appellant clearly barred by Order XXI Rule 58(2) of the Civil Procedure Code. In this regard, it would be appropriate to refer to the decision of this Court in *Alamelu Ammal vs. Chinnaswamy Reddiar* reported in (1998) 2 MLJ 395. The relevant observation of this Court reads as follows:-

“5. After hearing the arguments of both sides and on going through the judgment of the lower appellate court, I find that the learned Judge has not properly understood the amended provision of Order 21, Rule 58, C.P.C., and the presumption raised under Tamil Nadu Act 15 of 1976 in the case of alienation during the period of moratorium. Further, the learned Judge, as rightly pointed out by the learned



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Counsel for the appellant, relied on Rukkumani Animal v. Kamachi Animal MANU/TN/0152/1963 : AIR 1963 MAD 450, and held that such questions can be agitated only by a separate suit either under Section 53 of the Transfer of Property Act or by resorting to the provisions of the insolvency Act and the same cannot be gone into in these proceedings. The decision relied on by the lower appellate Court in Rukkumani Animal v. Kamachi Ammal MANU/TN/0152/1963 : AIR 1963 Mad 450, was one rendered prior to the amended Act 104 of 1976. But the learned Judge failed to consider the effect of the amended provision of Order 21, Rule 58, C.P.C., in view of Act 104 of 1976. In Southern Steelmet and Alloys v. B.N. Steel MANU/TN/0220/1978 : AIR 1978 Mad 270, a Bench of this Court held that "the adjudication referred to under Order 21, Rule 58, C.P.C. (as amended in 1976) is not summary and it is the intention of Legislature under the amended C.P.C., that it should be a decision as if rendered in a regular suit resulting in an appealable decree, the fuller examination of the rights of parties has to be held after giving them adequate opportunity to place all relevant materials before the Court so that the court could ultimately decide and adjudicate on all questions including questions relating to title or interest in the property attached." It is clear (from the ratio laid down in the abovesaid decision that) in view of the amended provisions of Order 21, Rule 58, C.P.C., the question



of filing a separate suit is barred and all questions relating to title or interest in the property attached have to be decided and adjudicated only in the claim proceedings and not by a separate suit.

Even prior to the amended provision of Act 104 of 1976, their Lordships of the Supreme Court in Abdul Shukoor, v. Anji Papa Rao MANU/SC/0048/1962 : AIR 1963 SC 1150, had observed as follows:

It is not correct to say that a transfer which is voidable under Section 53(1) of the Transfer of Property Act can be avoided only by a suit filed by a creditor impugning the transfer on behalf of himself and the other creditors and not by way of defence to a suit under Order 21, Rule 63 C.P.C., by a transferee-claimant whose application has been rejected in summary proceedings under Order 21, Rules 58 to 61, C.P.C. After the amendment of Section 53 Transfer of Property Act in 1929, the rule that a suit by a creditor should be brought in a representative capacity would apply as such to a suit to set aside a summary order under Order 21, Rule 63, C.P.C. as to other suits. But the amended Section 53(1) does not refer to a defence to a suit and if a defence under Section 53(1) could be raised by an attaching creditor defeated under the Section, such a defence need not be in a representative capacity. There was nothing in Section 53(1) as it originally stood which



precluded a defence by an attaching creditor to a suit to set aside a summary order under Order 21, Rule 63, C.P.C., that the sale in favour of the plaintiff is vitiated by fraud and the amendment has admittedly made no change in this matter.

The above view was already taken by this Court in a Full Bench decision reported in Ramaswami Chettiar v. Mallappa Reddiar I.L.R. 43 Mad. 760 wherein also it was held:

In a suit by an alienee, whose claim to property attached under a decree has been rejected, to set aside the order and establish his title, it is open to the attaching creditor to plead in defence that the transfer was in fraud of creditors.

It is clear from the ratio laid down in the above decisions that the attaching creditor need not file a separate suit under Section 53 of the Transfer of Property Act in a representative capacity to put forth his case that the transfer was in fraud of creditors and that he is entitled to plead by way of defence in the claim proceedings. In view of the Full Bench decision of this Court and that of the Supreme Court quoted above the decision reported in Rukkumani Ammal v. Kamachi Ammal MANU/TN/0152/1963 : AIR 1963 Mad 450 is No Longer The Good Law, and it is unfortunate that the decision of the Full Bench of this Court was not brought to the learned Subordinate Judge. It is found from the judgment of the lower



appellate Court that the presumption was laid only under Section 3 of Act 15 of 1976, while the presumption was raised only under Section 6 of the said Act. In view of the amended provision of Order 21, Rule 58, C.P.C. by virtue of the amended act 104 of 1976, which has been interpreted by a Division Bench of this Court in Southern Steelmet and Alloys v. B.N. Sttel MANU/TN/0220/1978 : AIR 1978 Mad 270, the view taken by the learned appellate Judge that the attaching creditor has to put forth his contentions in a separate suit and not in a claim proceeding, is not tenable and sustainable. Since the learned Appellate Judge had not approached the case in the light of the above well-established legal principles, but on the contrary, opposed to the same, and allowed the claim, it has become necessary for this Court to set aside the judgment and decree of the appellate Court, and remand the matter to the lower appellate Court for fresh disposal according to law. Since this Court is now remanding the matter, it is needless to express any opinion or give any finding on the question with regard to the nature of the transaction in favour of the claimant in view of the presumption under Section 6 of Act 15 of 1976. However, the substantial questions of law are answered accordingly in the light of the above legal principles.”

9. Therefore, it is clear that the appellant, who already filed claim



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petition and allowed the same to go for default is not entitled to file a separate suit in view of bar under Order XXI Rule 58(2) of the Civil Procedure Code. Both the Courts below correctly came to the conclusion that the separate suit filed by the appellant was not maintainable and consequently, dismissed the same. I do not find any error of law in the conclusion reached by the Courts below and accordingly, the Second Appeal is dismissed as devoid of any substantial question of law.

In Nutshell:-

- (i) The Second Appeal is dismissed.
- (ii) Consequently, the connected civil miscellaneous petition is closed.
- (iii) In the facts and circumstances of the case, there shall be no order as to costs.

18.12.2023

Index : Yes
Speaking order : Yes
Neutral Citation : Yes
dm



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To

- 1.The I Additional Sub Court,
Villupuram.
- 2.The Additional District Munsif's Court,
Villupuram.



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S.SOUNTHAR, J.

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