



C.M.S.A.No.24 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on 31.01.2023	Pronounced on 20.02.2023
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CORAM

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

C.M.S.A.No.24 of 2018

and

C.M.P.No.22711 of 2018

K.S.Krishna @ Santhanakrishnan,
S/o.Kulandaivel Chettiar
No.8, V.R.Vijayapuram
Tiruvarur Taluk
Tiruvarur Munsifi and District.

... Appellant

Vs.

1.Abishega Kattalai attached with
Thiyagarajaswamy Devasthanam Thiruvarur
represented by its Hereditary Trustee
Sri.La.Sri. Sathyagnana Mahadeva
Desiga Paramachari Swamigal
having office at Thirupugalur
Agneeswaraswamy Devasthanam Office,
Thirupughalur, Nagapattinam Munsifi and District.

2.N.S.Arjuna Raja,
S/o.Sankararaja,
No.1, Krishnan Kovil,
Vadacherry Village,
Agastheeswaram Village,
Kanyakumari District
Nagercoil District & Munsifi

... Respondents



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Prayer: Appeal filed under Order 42 r/w Section 104 C.P.C, r/w Section 100 of CPC, against the Judgment and Decree passed on 29.01.2016 in CMA.No.57 of 2008 on the file of the Principal District Judge, Tiruvarur and confirm the order dated 07.07.2008 in EA.No.35 of 2008 in EP.No.15 of 2006 in OS.No.117 of 2004 passed by the Executing Court (Sub Court Tiruvarur).

For Appellant : Mr.R.Lakshminarayanan

For Respondents : Mr.A.R.Nixon (for R1)

R2 - No appearance

J U D G M E N T

The Appeal has been filed against the Judgment and Decree passed on 29.01.2016 in CMA.No.57 of 2008 on the file of the learned Principal District Judge, Tiruvarur and confirm the order dated 07.07.2008 passed in EA.No.35 of 2008 in EP.No.15 of 2006 in OS.No.117 of 2004 passed by the Executing Court (Sub Court Tiruvarur).

2.Though the Appeal was not admitted, by consent of both the parties, the matter is taken up for final disposal.



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3.The 2nd Respondent herein had instituted a Suit in O.S.No.117 of 2004 for recovery of money from one Mr.K.S.Krishna, the Appellant herein. The suit was decreed on 07.12.2005. Execution proceedings has been initiated in EP.No.15 of 2006, the Judgment Debtor/Appellant herein has filed counter affidavit in EP. In the meanwhile, by an interim order there was a stay of sale of property granted in I.A.No.48 of 2006. The Execution Petition was terminated on 07.07.2008 and attachment was raised.

4.The first Respondent is a claim Petitioner viz., Abishega Kattalai attached to the Thiyagarajaswamy Devasthanam Thiruvarur has filed the claim Petition in EA.No.35 of 2008, contending that the land belongs to the Thiyagarajaswamy Devasthanam Thiruvarur and building & superstructure was constructed by the Defendant and hence attachment of the land and building and proclamation of sale of land and building in the public auction is unsustainable in law. The trial Court on consideration of the oral and documentary evidence dismissed EA.No.35 of 2008 and closed the EP and attachment was raised.



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5. Aggrieved against the said order, CMA.No.57 of 2008 was preferred before the District Judge, Tiruvarur. The learned Principal District Judge on consideration of the facts has come to the conclusion that since Judgment Debtor himself has admitted the fact that the above mentioned property belongs to Abishega Kattalai attached to Thiyagarajaswamy Devasthanam Thiruvarur, in the counter filed in EP.No.15 of 2016 in OS.No.117 of 2004, has held that the Defendant/Judgment Debtor having filed a counter affidavit admitting that the land belongs to the temple, cannot go behind the same and accordingly allowed the CMA and hence the CMSA.

6. Heard the learned counsel for the Appellant and the learned counsel for the 1st Respondent.

7. Learned counsel for the Appellant/Judgment Debtor would contend that the execution court could not have gone into the question of title and hence prayed for setting aside the impugned order and would further contend that whether E.A.No.35 of 2008, filed by the temple is maintainable in law, on the



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ground that it is pre-mature and misconceived and relied upon the Proviso to Section 100 (5) of CPC.

8.A perusal of records from the trial Court reveals that the entire decretal amount was deposited and consequently the EP was terminated. In the order of attachment, it is specifically stated that the sale of property includes land and building. As admitted by the Appellant/defendant in the counter affidavit before the execution Court that the land belongs to the temple and hence necessarily the land has to be excluded from the auction of the property in public auction and Section 100 (5) proviso provides that the deciding an issue not decided by the trial Court, can be decided thereafter and hence, I find that the order passed by the lower appellate court does not suffer from any illegality or irregularity and does not warrant interference of this Court.

9.At the risk of repetition, however for the sake of clarity, it is to be stated that on 07.07.2008, the Judgment Debtor/Appellant/Defendant has remitted the entire EP amount and the same was accepted by the Decree holder,



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full satisfaction of the said decree dated 07.12.2005, after dispute and contest, was recorded on 24.02.2008 and hence, the order passed by the lower Appellate Court that the Petition filed by the Hereditary Trustee of the Temple in EA.No.35 of 2008 under Order 21 Rules 58 to raise the attachment of the petition property, so far as it relates to the land belonging to the temple is maintainable and hence, I do not find any substantial questions of law for admitting the CMSA.

10. Similar view was expressed in the decision reported in **1998 (1) CTC 558 [K.Kalimuthu (died) and 4 others Vs. Athmajothi alias Krishnamurthy and another]**.

11. Accordingly, the Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

20.02.2023

Index : Yes/No
Neutral citation : Yes/No
Speaking Order/Non-Speaking Order
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To
The Principal District Judge,
Tiruvarur.



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RMT.TEEKAA RAMAN.J,

sai

Pre-delivery Judgment made in

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Dated:20.02.2023