



C.R.P.(PD)(MD).Nos. 2634 to 2640 of 2015

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 05.09.2023

DELIVERED ON: 05.10.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.R.P.(PD)(MD).Nos.2634 to 2640 of 2015
and MP(MD).Nos. 1,1,1,1,1,1 and 1 of 2015

CRP(MD).No.2634 of 2015:

Muralikrishnan

...Petitioner

Vs

1.M.Shanthi

2.P.Jeyapal

....Respondents

PRAYER in CRP(MD).No.2634 of 2015: Civil Revision Petition filed under Section 115 of the Civil Procedure Code, to call for the records relating to the fair and decreetal order dated 25.09.2014 made in I.A.No.12 of 2013 in I.A.No.91 of 2009 in O.S.No.72 of 2009 on the file of the I Additional District Judge, Madurai, set aside the same and consequently allow the civil revision petition.



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(In all revisions)

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For Petitioner : Mr.J.Anandkumar

For R1 : Mr.PT.S.Narendravasan

For R2 : No appearance

COMMON ORDER

All the revision petitions have been filed by the decree holder in a money suit challenging the allowing of claim petitions filed under Order 38 Rule 10 of C.P.C.

Factual background:

2.The revision petitioner as plaintiff had filed O.S.No.72 of 2009 on the file of the I Additional District Court, Madurai for the relief of recovery of a sum of Rs.8,00,000/-. Pending suit, the plaintiff had filed I.A.No.91 of 2009 seeking an order of attachment before judgment. The said application was allowed on 28.10.2009. The suit was decreed exparte on 15.02.2010. The decree holder filed E.P.No.1 of 2013 to bring the attached property for sale.

3.While the execution petitions were pending, seven claim petitions in I.A.Nos.12 to 18 of 2013 were filed by seven claimants contending that all of them have purchased the property on 23.04.2008



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from the defendants through his power agent. They have further contended that they had purchased the property one year prior to the filing of the suit and therefore, on the date of passing of the order of attachment before judgment, the defendant was not the owner of the property. Hence, we prayed for rasing the order of attachment. All these seven interim applications were filed in I.A.No.91 of 2009.

4.The decree holder filed a counter in all the claim petitions contending that the claim petition under Order 38 Rule 10 of C.P.C is not maintainable and only a petition under Order 21 Rule 58 of C.P.C is maintainable. The decree holder further contended that the power deed that was executed by the defendants in favour of one Ayyadurai and Rajendran was cancelled on 22.02.2008 and another power deed was executed by the defendant on 25.02.2008 in favour of one Padmanabhan. However, the sale deed in favour of the claimants has been executed by Ayyadurai and Rajendran on 23.04.2008 without any authority whatsoever. Therefore, the claim petitioners do not have any title to the property and the claim petitions have been filed with a malafide intention to drag on the execution proceedings.



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5.The trial Court relied upon Order 38 Rule 10 C.P.C to arrive at a finding that the sale deed in favour of third party has been executed one year prior to the filing of the suit and therefore, the said property could not have been attached under I.A.No.91 of 2009 on 28.10.2009. However, the trial Court did not go into the issue of validity of the sale deed and proceeded to hold that the sale having taken place one year prior to the order of attachment, would not be binding upon the third party and raised the order of attachment. Challenging these seven orders, the present revision petitions have been filed.

Submissions of the Counsels:

6.The learned counsel appearing for the revision petitioner had contended that after a suit has been decreed, an application under Order 38 Rule 10 of C.P.C cannot be filed in I.A.No.91 of 2009. Therefore, filing of the application itself is not maintainable. The learned counsel had relied upon the judgment of this Court reported in **2019-3-L.W.970 (Surya Pelle Chemical & Mould Vs. Hi-Lite Leathers and others)** to convince the Court that once a decree is passed, the Court becomes functus officio and thereafter, cannot proceed to pass order in the interim applications that were filed prior to the decree.



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7.The learned counsel for the revision petitioner had further contended that the claim petitioners have to establish their independent title to the property. Merely on the basis of the date of sale deed, the claim petitioners cannot succeed. In the present case, the defendant had executed a power of attorney in favour of one Ayyadurai and Rajendran and the same was cancelled by him on 22.02.2008. On 25.02.2008, he has executed another power deed in favour of one Padmanaban. However, relying upon the power deed in favour of Ayyadurai and Rajendran, the claimants have purchased the properties on 23.04.2008. Therefore, on the date of execution of the sale deed, the said Iyyadurai and Rajendran did not have any authority to execute the sale deed on behalf of the defendant. Therefore, the sale deed is not valid in the eye of law. This issue has not been properly considered or appreciated by the trial Court. He had further contended that only with a malafide intention to drag on the execution proceedings, the present claim petitions have been filed. Hence, he prayed for allowing these revisions and to permit the decree holder to proceed with the sale of the attached properties.

8.Per contra, the learned counsel appearing for the respondents/ claim petitioners had contended that the claim petitioners have purchased



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the property one year prior to the order of attachment before judgment.

The sale deed is registered and it is reflected in the encumbrance certificate. Hence, on the date of passing of the order of attachment before judgment, the defendant was not the owner of the property. In view of the provisions under Order 38 Rule 10 of C.P.C, any order of attachment passed would not affect the rights of the stranger which is existing prior to the order of attachment. The defendant had not questioned the sale deed executed by the said Ayyadurai and Rajendran in favour of the claim petitioners and therefore, the plaintiff will not have any locustandi to dispute the said sale deed.

9.The learned counsel for the respondents had further contended that in view of Order 38 Rule 11 of C.P.C, an order of attachment passed before judgement would continue to operate even after the decree is passed and there is no necessity to re-attach the property in the execution proceedings. Therefore, any order passed in I.A.No.91 of 2009 would continue operate even after the decree. Hence, filing of I.A.Nos.12 to 18 of 2013 in I.A.No.91 of 2009, after the decree is passed, is legally valid.

10.The learned counsel for the respondents had further contended that in paragraph No.2 of the counter affidavit, the decree



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holder had admitted that only a claim petition under Order 21 Rule 58 of C.P.C is maintainable and not a claim under Order 38 Rule 10 of C.P.C. Consequently, it is clear that the decree holder is only objecting to the alleged wrong quoting of the provision of law and not with regard to the maintainability of the petitioner or jurisdiction of the Court to entertain such a petition.

11.The learned counsel for the respondents had further contended that since the order of attachment before judgment continues to operate after passing of the decree, the trial Court would not become functus officio to entertain a claim petition to raise the said order of attachment. The claim petitioners being third parties to the suit, can very well contend that the order of attachment is not maintainable in view of the fact that the defendant was not the owner of the property on the date of passing of order of attachment before judgment. Hence, he prayed for dismissal of the revision petitions.

12.I have given anxious consideration to the submissions made on either side and perused the material records.

Discussion:

13.The only issue that arises for consideration is whether a claim



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is maintainable under Order 38 Rule 10 of C.P.C after the suit has been decreed. The order of attachment before judgment has been passed by the trial Court on 28.10.2009. As per Order 38 Rule 9 of C.P.C, the Court is empowered to withdraw the said order when the defendant furnishes security or when the suit is dismissed. Order 38 Rule 10 of C.P.C declares that any order of attachment before judgement, shall not affect the pre-existing rights of strangers to the suit. As per Order 38 Rule 11 of C.P.C, where a property has been attached before judgment and the suit is decreed in favour of the plaintiff, there is no necessity for re-attaching the property in the execution proceedings. Order 38 Rule 11-A of C.P.C clarifies that when an order of attachment before judgment continues after judgment by virtue of the provisions of Rule-11, the provisions of attachment made in the execution of the decree shall start operating. Therefore, it is clear that once a suit is decreed, Order 21 Rules 55 to 59 will start operating with regard to the raising of attachment, determination of attachment or adjudication of claims or objection relating to attachment of the immovable properties which was effected prior to decree.

14. In view of operation of Order 21 Rule 55 to 59 of C.P.C, the attachment before judgment order would be deemed to be withdrawn



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when the decree amount is satisfied or the decree is set aside or reversed.

However, when the execution petition is dismissed, a specific order has to be passed by the Court determining the order of attachment. But, the Executing Court is empowered to continue the order of attachment for a period to be specified. As per Order 21 Rule 58 of C.P.C, the claim petition could be filed or an objection could be made to the order of attachment on the ground that the property is not liable for attachment. In such cases, the Court shall proceed to adjudicate upon the said claim. Under Order 21 Rule 59 C.P.C, the Court is empowered to grant an order of stay, postponing the sale pending adjudication of the claim petition or such objection. The Court may also permit the sale but stay the confirmation of the said sale. Therefore, it is clear that all these provisions viz.Order 21 Rules 55 to 59 of C.P.C become applicable to an order of attachment before judgment which continues after the decree.

15.Conscious of this legal position, the decree holder has categorically admitted in Paragraph No.2 of the counter that the claim petitioners have a right to file a claim petition only in E.P.No.1 of 2013 under Order 21 Rule 58 of C.P.C. Hence, it is clear that the maintainability of the claim petition before the said Court is not in question but only the



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provisions of law under which the same has been filed is challenged. It is settled position of law that wrong quoting of the provisions of law would not render the said application as not maintainable. The Courts have to scrutinize the contents of the petition and the prayer there on to pass orders under the appropriate provisions of law which are applicable to the said facts.

16.Though Order 38 Rule 10 of C.P.C has been referred to in the claim petition, the said provision is only a declaration that the attachment would not affect the strangers who are having right prior to the order of attachment. The correct provision of law which has to be invoked for filing a claim petition to raise the order of attachment before judgment which is continued after the decree is Order 21 Rule 58 of C.P.C.

17.The learned counsel for the revision petitioners had relied upon the judgement of this Court reported in **2019-3- LW- 970 (Surya Pelle Chemical & Mould Vs. Hi-Lite Leathers and others)** to impress upon the Court that after passing of the decree, the Court becomes functus officio and thereafter, it cannot entertain any interim application in the suit. In the said judgment, an order of attachment before judgment has been passed on 23.04.2014 and the parties entered into a compromise on



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27.06.2014 and a compromise decree was recorded before the Lok-Adalath on the same day. As per the said compromise decree, the decretal amount has to be paid in instalments from July 2014 to December 2018 spreading over a period of four years. However, the trial Court proceeded to dismiss the attachment application on the basis of Lok-Adalath award on 30.06.2014 itself. The learned Single Judge had relied upon Order 38 Rule 11 of C.P.C to arrive at a finding that the order of attachment would continue even after the decree and therefore, the award of the Lok-Adalath would not terminate the order of attachment before judgement.

18.The learned Judge has also relied upon Order 21 Rule 55 of C.P.C to arrive at a finding that unless and until the decree is satisfied, the order of attachment before judgment would continue to operate. In the reported judgment, the decree would be fully discharged/satisfied only if all payments are effected in December 2018. Therefore, the trial Court in the said case was not right in raising the order of attachment in June 2014 merely relying upon the compromise decree.

19.The facts of the present case are completely different. Third parties to the suit have come out with an objection petition to raise the order of attachment on the ground that they have purchased the property



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one year prior to the date of attachment before judgment. Only a party to the suit would be bound by the order of attachment before judgement during the suit, pending execution proceedings and till the decree is fully satisfied. However, a third party to the suit is not bound by the order of attachment before judgment in view of Order 38 Rule 10 of C.P.C especially when he had purchased the property one year prior to the order of attachment.

20.The learned Judge in the judgment reported in **2019-3-L.W-970 (Surya Pelle Chemical & Mould Vs. Hi-Lite Leathers and others)** has pressed into service, doctrine of functus officio to hold that the trial Court would not be entitled to dismiss the attachment before judgment application after the said suit is decreed. In the present case, no orders have been passed dismissing the application for order of attachment. The third parties to the suit have filed the claim petition to raise the order of attachment. In view of Order 38 Rule 11 of C.P.C, the attachment before judgment order continues to operate even after passing of the decree. Therefore, for raising an order attachment before judgement, a third party to the suit would always be entitled to approach the same Court even after the decree is passed. The only difference would be that if the suit is



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pending, the claim petition should be filed under Order 38 Rule 8 of C.P.C.

On the other hand, if the suit had been decreed and the order of attachment before judgment continues, the claim petition has to be filed under Order 21 Rule 58 of C.P.C.

21. Even if an application is filed under Order 21 Rule 58 of C.P.C, the said adjudication would be only based upon the same set of facts to the affect that whether the order of attachment passed before judgment would affect the pre-existing right of the strangers to the suit or not. If the trial Court is considered to be functus officio after passing of the decree, the said Court would not be entitled to deal with the application under Order 21 Rule 58 of C.P.C also, which deals with the adjudication of claims and objections arising under order of attachment before judgment. Therefore, this Court is of the considered opinion that the doctrine of functus officio cannot be invoked in the facts and circumstances of this case as narrated above.

22. It is settled position of law that all the interim orders would get merged with final judgment or order. However, in view of the statutory provision under Order 38 Rule 11 of C.P.C, the interim order namely the order of attachment before judgement continues to operate when a decree



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is subsequently passed in favour of the plaintiff. In view of the said statutory provision, the order of attachment before judgment continues even after the decree and gets terminated only when the circumstances contemplated under Order 21 Rule 55 of C.P.C or under Order 21 Rule 57 of C.P.C are satisfied.

23.As per Order 38 Rule 5 of C.P.C, an order of attachment could be passed by the Court if it is satisfied that the defendant is about to dispose of the whole or any part of his property. Therefore, the plaintiff is called upon to establish not only the fact that the defendant is attempting to dispose of the property, but also the fact that the property belongs to the defendant on the date of filing of the application for attachment before judgment. The trial Courts shall do well to see that encumbrance certificates are filed by the plaintiff to establish the interest of the defendant in the property on the date of application. In case the properties had devolved upon the defendant from his ancestors, apart from encumbrance certificate, the trial Court should insist upon the revenue records to establish the character and nature of interest of the defendants in the property sought to be attached. If such an exercise had been undertaken in the present case, the encumbrance certificate would have revealed that



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one year prior to the filing of the suit, the defendant had lost title. This would have avoided the present litigation.

24. Though it is contended on the side of the revision petitioners that the claim petitioners have purchased the property from the power agent whose power deed has been cancelled by the defendant, the defendant had not raised any objection to the said sale deeds. Order 21 Rule 58 of C.P.C contemplates not only adjudication of claim petitions but also objections to the order of attachment. Only if a claim petition is filed, the claimant is expected to prove his title, independently. But the present applications have been filed admitting the title of the defendant, but raising objections to the order of attachment before judgment. Therefore, Executing Court was right in merely relying upon the date of sale to raise the order of attachment on the ground that the defendant had alienated the property one year prior to the order of attachment. Therefore, the said contention raised on the side of the decree holder would not be sustainable in the eye of law.



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25. In view of the above said deliberations, there are no merits in the revision petitions. All the Revision Petitions stand dismissed. No costs. Consequently, all the miscellaneous applications are closed.

05.10.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1. The I Additional District Judge, Madurai
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR, J

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Pre-delivery common order made in
C.R.P.(PD)(MD).Nos.2634 to 2640 of 2015
and MP(MD).Nos. 1,1,1,1,1,1 and 1 of 2015

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