



S.A.(MD).No.215 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.04.2023

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

S.A.(MD).No.215 of 2017

and

C.M.P.(MD).No.4338 of 2017

1.Pappa

2.Minor.Sri Durga

... Appellants/Respondents/Plaintiffs

Vs.

Padmanabhan

...Respondent/Appellant/Defendant

Prayer: Second Appeal is filed under Section 100 of CPC to set aside the judgment and decree dated 29.10.2009 made in A.S.No.3 of 2009 on the file of the 2nd Additional Sub Court, Nagercoil, insofar as the setting aside and modification of order of attachment of suit schedule properties in O.S.No.450 of 2005 on the file of the 1st Additional District Munsif Court, Nagercoil, dated 22.01.2008.

For Appellants : Mr.T.Selvakumaran

For Respondent : Mr.A.R.Sethupathy



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JUDGMENT

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This Second Appeal has been filed challenging the judgment and decree of the Lower Appellate Court, namely, the II Additional Sub Court, Nagercoil in A.S.No.3 of 2009 dated 29.10.2009. The appellants are the plaintiffs in the suit O.S.No.450 of 2005 on the file of the I Additional District Munsif Court, Nagercoil. The first appellant is the mother and the second appellant is her daughter. The respondent is the defendant in the suit and is the husband of the first appellant/first plaintiff.

2. The suit was filed by the appellants/plaintiffs seeking for maintenance from the respondent/defendant, who is the husband of the first appellant. The Trial Court decreed the suit in favour of the appellants/plaintiffs by granting the relief of maintenance as well as granted attachment of the suit schedule property by its judgment and decree dated 22.01.2008 and the said judgment and decree was passed by the I Additional District Munsif Court, Nagercoil in O.S.No.450 of 2005. Aggrieved by the same, the respondent/defendant filed a first appeal before the II Additional Sub Court, Nagercoil in A.S.No.3 of 2009. The Lower Appellate Court partly allowed the first appeal in A.S.No.3 of 2009 filed by the defendant by upholding the relief of maintenance granted by the Trial Court, but by reversing the finding of the Trial Court with regard to the



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attachment of the suit schedule property. The Lower Appellate Court has raised the attachment granted by the Trial Court by the impugned judgment and decree dated 29.10.2009. Aggrieved by the raising of the attachment, the plaintiffs in the suit have filed this Second Appeal. In the forthcoming paragraphs, the parties are described as per their litigative status in the suit.

3. This Court on 02.06.2017 admitted the Second Appeal by formulating the following substantial question of law:

"Whether the judgment of the First Appellate Court setting aside the decree of the trial Court creating a charge over the property is sustainable in law?"

4. Admittedly, the main relief sought for by the plaintiffs against the defendant is for maintenance. The relief of attachment of the defendant's property can be sought for only if the plaintiffs are able to get a decree in their favour in respect of the maintenance amount and it can be sought for only in the execution proceedings. However, the plaintiffs have chosen to file a suit for recovery of maintenance as well as for attachment of the property owned by the defendant. The Trial Court, namely, the I Additional District Munsif Court, Nagercoil, by its judgment and decree dated 22.01.2008 in O.S.No.450 of 2005,



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has erroneously granted the relief of attachment in the suit itself, though the said relief can be sought for by the plaintiffs only in an execution petition.

5. The Lower Appellate Court, namely, the II Additional Sub Court, Nagercoil by its judgment and decree dated 29.10.2009 passed in A.S.No.3 of 2009, has rightly set aside the attachment order passed by the I Additional District Munsif Court, Nagercoil in its judgment and decree dated 22.01.2008 in O.S.No.450 of 2005. The Lower Appellate Court has also observed in the impugned judgment and decree that the suit schedule property is not belonging to the defendant, while reversing the finding of the Trial Court that the plaintiffs are entitled for an attachment order.

6. It is also brought to the notice of this Court by the learned counsel for the appellants that the subject property has already been sold to a third party by the defendant and on that score, the learned counsel for the appellants submits that the purchaser of the property will have to be impleaded in this Second Appeal, as according to him, he is a necessary party for the effective adjudication of this Second Appeal. As observed earlier, the relief of attachment can be sought for by the plaintiffs only in an execution petition and not in the suit when the main relief sought for by the plaintiffs in the suit is only



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for recovery of maintenance amount from the defendant. Only when the plaintiffs have proved by oral and documentary evidence with regard to their maintenance claim and that too, only after a decree is passed for the maintenance amount in favour of the plaintiffs, the plaintiffs can seek for attachment of the property owned by the defendant in an execution petition to execute the maintenance decree. Therefore, there is no necessity for impleading the purchaser of the property, which was earlier owned by the defendant according to the plaintiffs, for effective adjudication of this Second Appeal.

7. A charge cannot be created over a property in a maintenance suit filed by the plaintiffs against the defendant by a judgment and decree passed in the suit filed for maintenance. The Lower Appellate Court has rightly set aside the decree of the Trial Court under which a charge was erroneously created over the property allegedly belonging to the defendant. Therefore, the substantial question of law formulated by this Court while admitting the Second Appeal, as extracted supra, is answered against the plaintiffs/appellants by holding that the Lower Appellate Court has rightly set aside the decree of the Trial Court creating a charge over the property as it is not sustainable in law. This Court has also taken note of the fact that the subject property has already been sold to



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a third party and no longer the defendant is its owner. In the result, there is no merit in this Second Appeal.

8. Accordingly, this Second Appeal is dismissed. However, liberty is granted to the appellants/plaintiffs to execute the judgment and decree of the Lower Appellate Court by filing an execution petition. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

06.04.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
Lm

To

- 1.The II Additional Sub Court,
Nagercoil.
- 2.The I Additional District Munsif Court,
Nagercoil.
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court, Madurai.



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ABDUL QUDDHOSE, J.

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