



C.M.S.A.No.4 of 2005

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.03.2024

Coram:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

C.M.S.A.No.4 of 2005

and

C.M.P.Nos.5595 of 2005 and 3934 of 2022

1. Chinnapillai Kounder (died)

2. Sadayapillai

3. Palaniammal

(Appellants 2 and 3 are brought on record

as legal representatives of the deceased

first appellant, vide order dated03.2024

in C.M.P.No.3934 of 2022 in C.M.S.A.No.4 of 2005)

.. Appellants

Vs.

1. Chinnaponnu

2. Sureshkannan

3. Vijaya

4. Vadamalai

(Respondent No.4 is brought on record

as legal representative of the deceased

first appellant, vide order dated 27.03.2024

in C.M.P.No.3934 of 2022 in C.M.S.A.No.4 of 2005)

.. Respondents

Civil Miscellaneous Second Appeal under Order 21 Rule 5 of the Code of Civil Procedure and Section 100 CPC against the judgment and decree dated 31.12.2004 in A.S.No.94 of 2004 on the file of the Principal District Court,

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Villupuram, reversing the fair and decretal order dated 08.12.2003 in E.A.No.3 of 2003 in O.S.No.172 of 2000 on the file of the Subordinate Court, Kallakurichi.

For appellant : Mrs.R.Meenal

For respondents: R-1 notice sent returned as insufficient address

R-2 Mr.R.Bharath Kumar

R-3 Died

JUDGMENT

C.M.P.No.3934 of 2022: Since it is stated that the sole appellant in the appeal died, this petition has been filed to bring on record the petitioners 2 and 3 and the 4th respondent in this C.M.P., as legal representatives of the deceased sole appellant as appellants 2 and 3 and fourth respondent in the appeal. Upon hearing both sides and the proposed parties being proper and necessary parties for effective adjudication of the appeal, this impleading petition is ordered.

2. CMSA:

This Civil Miscellaneous Second Appeal is filed against the judgment and decree dated 31.12.2004 in A.S.No.94 of 2004 on the file of the Principal District Court, Villupuram, reversing the fair and decretal order dated 08.12.2003 in



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E.A.No.3 of 2003 in E.P.No.8 of 2002 in O.S.No.172 of 2000 on the file of the Subordinate Court, Kallakurichi.

3. Earlier, the said suit in O.S.No.172 of 2000 was filed by the first appellant herein as plaintiff (since deceased), for recovery of money and the Court below granted decree against the third respondent herein for recovery of Rs.30,000/- with interest. Pending the said suit, the first appellant herein filed a petition to attach her properties before judgment and the third respondent entered appearance through counsel and on 22.09.2000, the third respondent gave an undertaking by filing an affidavit that she would not sell the property. The ABJ petition was closed recording the said undertaking. Further, on 04.10.2000, the third respondent herein had conspired with her family friend, and had sold the property to the first respondent's husband Chellamuthu, without any consideration, only to defeat the rights of the appellant herein. The said Chellamuthu's house is right next to the property. Thereafter, E.P. proceedings commenced and pending the Execution Proceedings in E.P.No.8 of 2002 filed by the first appellant, the first and second respondents herein who are the widow and son of Chellamuthu, filed E.A.No.3 of 2003 under Order 21 Rule 58 CPC in the E.P. proceedings on the ground that the property(ies) could not be attached. The said E.A. came to be dismissed, against which, the respondents 1 and 2 herein (defendants 1 and 2) filed appeal in A.S.No.94 of 2004, which was

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allowed, against which, the plaintiff (since deceased) has preferred the present CMSA.

4. This appeal was admitted on 30.03.2005, but no substantial question of law was framed by the Court.

5. In the grounds of appeal, the first appellant/plaintiff/decreed-holder had raised the following substantial questions of law:

(i) Whether in law, the lower appellate Court was right in omitting to see that the purchase by the claim petitioner is hit by lis-pendens under Section 53 of the Transfer of Property Act ? and

(ii) Whether in law the lower appellate Court was not wrong in failing to see that the sale after undertaking not to sell, was collusive and that there was clear abuse of process of Court ?

6. Learned counsel for the first appellant/decreed-holder submitted that Chellamuthu purchased the property of the third respondent herein, who borrowed money from the first appellant herein and executed Promissory Note on 05.12.1997 for a sum of Rs.30,000/-, and since she did not repay the money, the first appellant herein filed a suit in O.S.No.172 of 2000 on 28.02.2000 on the file of the Subordinate Court, Kallakurichi and she also filed an interlocutory



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application in I.A.No.299 of 2000 under Order 38 Rule 5 CPC for ordering 'attachment before judgment' (ABJ). The third respondent entered appearance through a counsel and filed an affidavit of undertaking on 22.09.2000, which was marked as Ex.R-1 before the Executing Court. After giving the said affidavit of undertaking, she sold the property to the said Chellamuthu on 04.10.2000, and thereafter, the first appellant obtained decree in O.S.No.172 of 2000 on 08.12.2003, since the third respondent had not paid the decretal amount and filed Execution Petition in E.P.No.8 of 2002 and pending the said E.P., the respondents 1 and 2 herein filed E.A.No.3 of 2003 under Order 21 Rule 58 CPC, which was dismissed, against which, the respondents 1 and 2 herein filed A.S.No.94 of 2004 before the first appellate Court, and the lower appellate Court failed to re-appreciate the evidence properly and erroneously allowed A.S.No.94 of 2004 on 31.12.2004 by setting aside the fair and decretal order of the Executing Court, against which, the first appellant is before this Court by way of filing this CMSA.

7. Learned counsel for the appellants further contended that the said Chellamuthu is not a bona-fide purchaser for valuable consideration, without noticing the defective title. The purchase made by the said Chellamuthu from the third respondent herein, is hit by the provisions of Section 53 of the Transfer of Property Act, since the third respondent sold the property to the said

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Chellamuthu after filing the undertaking affidavit, undertaking not to sell the property and deliberately and suppressingly the fact that she had sold the property in order to defeat the claim of the first appellant and Chellamuthu also knowing fully well that the third respondent borrowed the money from the first appellant and had executed the Promissory Note, based on which, she filed the said suit and also executed the undertaking affidavit and the property in question was also attached. Despite knowing the fact the said Chellamuthu without paying any consideration, and in order to defeat the claim of the first appellant, got the sale deed executed in favour of him, and the said Chellamuthu is a neighbour to the property that was attached, and therefore, he is not the bona-fide purchaser for valuable consideration, without noticing the defective title. Though the trial Court had rightly appreciated the evidence and dismissed the claim petition filed by respondents 1 and 2, the first appellate Court erroneously appreciated the evidence and allowed the First Appeal and set aside the order passed by the Executing Court. After giving the undertaking, the subsequent alienation is only a clear abuse of process of Court and in order to defeat the rights of the decree-holder and frustrating the decree of the Court, any alienation made fraudulently, the said sale deed will not bind the decree-holder. Therefore, the appeal may be allowed and the judgment and decree of the first appellate Court are liable to be set aside and that of the trial/Executing Court may be restored.

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8. Learned counsel for the second respondent submitted that the said late

Chellamuthu is the purchaser of the property from the third respondent and the first and second respondents are the legal heirs of the said Chellamuthu and the first respondent is none other than the wife of the said Chellamuthu and the second respondent is the son of Chellamuthu. The said Chellamuthu was not aware of any pending suit between the first appellant and third respondent and also the loan transaction and the decree obtained by the first appellant against the third respondent and pending suit, the third respondent gave an undertaking before Court not to alienate the property. The said Chellamuthu is the bona-fide purchaser for valuable consideration without noticing the defective title or encumbrance during the lifetime of Chellamuthu and he was not aware of that and subsequently, the respondents 1 and 2 came to know that Execution proceedings were pending and the first appellant was taking steps to sell the property, and therefore, they have filed the claim application in E.A.No.3 of 2003 in E.P.No.8 of 2002 in O.S.No.172 of 2000. The trial Court failed to appreciate the evidence to the effect that Chellamuthu was not aware of any of the dispute between the first appellant and the third respondent and he was a bona-fide purchaser and the trial Court erroneously failed to appreciate the evidence and wrongly dismissed the claim petition filed by respondents 1 and 2, whereas the respondents 1 and 2 filed appeal before the lower appellate Court, which rightly, as a final Court of fact-finding, re-appreciated the evidence and allowed the

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appeal, and hence, there is no merit in the present Second Appeal.

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9. Learned counsel for the second respondent further submitted that either in the attachment or in the undertaking reflected in the Encumbrance Certificate, unless it is reflected that the evidence widely proclaimed was in the manner known to law, and it was not possible for the said Chellamuthu to be aware of the litigation and also the undertaking affidavit or the attachment and none of the evidence shows that the said Chellamuthu was aware of the facts till he purchased the property or in order to defeat the claim of the appellant, he colluded with the third respondent in order to defraud the first appellant and without any consideration, they have made the sale transaction. Even the second respondent was examined as P.W.1 before the trial Court and one of the witness to the said sale deed Ex.P-1 was examined as P.W.2, who clearly stated that the said Chellamuthu paid the consideration as mentioned in the recitals of the document and after receiving the said money, the third respondent executed the sale deed and that P.W.2 was a witness to the sale deed. The first appellate Court re-appreciated the evidence to the effect that neither the said Chellamuthu, nor P.W.2 was witness to the undertaking bond given by the third respondent before the Court in the suit filed by the first appellant and that he was not alienating the property. There is no evidence to show that the said Chellamuthu was aware of the loan transaction or any of the encumbrance or



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any other dispute. The first appellant failed to establish that the said Chellamuthu, after knowing all the disputes and the undertaking/attachment and the decree of the Court, purchased the property from the third respondent.

10. In support of his above submissions, learned counsel for the second respondent relied on the following judgments:

(i) 2012 (1) CTC 407 = 2012 AIR CC 443 = 2011 SCC Online Madras 1709 = 2011 (5) LW 369 (Sri Humbi Hema Gooda Sri Gayathri Peda Sri Devanga Jagathguni Charitable Trust Vs. M/s.The Tamil Nadu State Transport Corporation (CBE) Limited, and others):

"13. The principles enunciated in the said decision would show that communicating the order of attachment to the concerned registering officer is mandatory under Order 38 Rule 11-B and in the absence of communication, the order of attachment has no force. Under these circumstances, I am of the opinion that since the order of attachment itself is void, the submission made by the learned counsel for the 1st respondent, relying upon section 64 cannot be countenanced."

(ii) 2000 (2) CTC 524 (Sri Krishna Chit Funds (Sattur Private Limited), Sattur,Vs. R.S.Pillai and another):

"7. Now I shall refer the relevant provisions regarding the order of attachment. As per Section 64, C.P.C., where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein--shall be void as against all claims enforceable under the attachment. Order 21, Rule 54, C.P.C. speaks about attachment of immovable property. It is as follows:-



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"Order 21 Rule 54: Attachment of immovable property: (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(1A): The order shall also require the judgment-debtor to attend court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, an also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate, and where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.

High Court Amendment (Madras): (i) Substitute the following for sub-rule (2):

"(2): The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode. A copy of the order shall be affixed on a conspicuous part of the property and on a conspicuous part of the Court-house, where the property is land paying revenue to the Government, a copy of the order shall be similarly affixed in the office of the Revenue Divisional Officer of the area where the land is situated. Where the property is situated within Cantonment limits the order shall be similarly affixed in the office of the Local Cantonment



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Board and the Military Estates Officer concerned, and where the property is situated within the limits of a Municipality, in the office of the Municipality within the limits of which the property is situated."

(ii) Add the following as sub-rule (3):

"(3) The order of attachment shall be deemed to have been made as against transferees without consideration from the judgment-debtor from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2), whichever is earlier."

Order 21, Rule 58 relate to adjudication of claims to, or objections to attachment of property. As per sub-rule (2), all questions 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. Order 21, Rule 58-A speaks about communication of the order of attachment to the Registering Officer.

"58-A: Order of attachment to be communicated to the Registering Officer: Any order of attachment passed under Rule 54 of this Order raising the attachment by removal, determination of release passed under Rules 55, 57 or 58 of this Order, shall be communicated to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such order is situate." (Amendment dt.29.6.1987).

Order 38, Rule 11 says that the property attached before judgment not to be re-attached in execution of decree. As per Rule 11A, the provisions of this Code applicable to an attachment made in execution of a



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decree shall apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of Rule 11. Here again, Rule 11-B speaks about communication of order of attachment to the Registering Officer. It reads thus:

"Rule 11-B: Order of attachment to be communicated to the Registering Officer: Any order of attachment passed under Rule 5 or 6 of this order raising the attachment passed under Rule 9 of this order shall be communicated to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such order, is situate. "(Amendment dated 29.06.1987)".

When an order of attachment of immovable property is made before judgment, certain procedures have to be complied with as per sub-rule (2), Order 21, Rule 54. The order of attachment has to be proclaimed at some place on or adjacent to such property by beat of drum and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any having jurisdiction over that village. Though an order has been made for attaching the property in question before judgment even on 14.3.97, no one appeared and explained before the Sub Court regarding compliance of sub-rule 2 referred to above. As a matter of fact the claimant namely appellant herein alone was examined as P.W.1 and no one was examined on the side of the respondents. As per amendment to Order 21, Rule 58 made by this Court (Amendment dated 29.06.1987), the order of attachment passed under Rule 54 raising the attachment by removal, determination or release passed under Rules 55, 57 or 58 shall be communicated to the Registering Officer within the



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local limits of whose jurisdiction the whole or any part of the immovable property under attachment comprised is situate. Similar provision is brought in on the same term in Order 38, Rule 11-B. The reading of the Madras High Court Amendment in Order 21, Rule 54 would show that the attachment order has to be proclaimed at some place on or adjacent to such property by beat of drum and a copy of the order shall be affixed on a conspicuous part of the property and on a conspicuous part of the Court-house. If the property is land paying revenue to the Government, a copy of the order shall be affixed in the office of the Revenue Divisional Officer of the area where the land is situated. Where the property is situated within the limits of a Municipality, the order shall be affixed in the office of the Municipality within the limits of which the property is situated. Likewise, High Court amendment namely Rule 58-A authorises the Court that any order of attachment passed under Rule 54 raising the attachment by removal, determination or release passed under Rules 55, 57 or 58 of this Order, shall be communicated to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such order is situate."

"15. In Murugappa Chettyar Vs. Thirumalai Nadar and others, 1947 (2) MLJ 310, after considering Order 21, Rule 54, Rajamanner, J (as His Lordship then was) has held as follows:-

"The fact that an order for attachment has been pending is not sufficient to establish the factum of attachment. An attachment cannot be said to have been made unless and until the provisions of both sub-rules of Order 21, rule 54, civil procedure, have been complied with, that is to say there must first be an order prohibiting the judgment-debtor from transferring or charging the property in any way and secondly the order must be proclaimed by beat of tom tom near the



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property and copies of the prohibitory order must be affixed on a conspicuous part of the property, on a conspicuous part of the Court house and where the property is land paying revenue to the Government in the office of the collector of the District in which the land is situate. Where several properties are sought to be attached in pursuance to an order of attachment there must be proof of affixture on every one of the properties.

Illustration (e) to section 114 of the Indian Evidence Act no doubt declares that judicial and administrative acts may be presumed to have been regularly performed. But it does not say that it may be presumed that any particular judicial or official act has been performed. No doubt when the only evidence is that a particular judicial or official act has been performed and there is no other evidence on record, it may be presumed that the particular judicial or official act was regularly performed. But when the dispute is whether a particular judicial or official act was performed or not, there is nothing in law which enables a Court to presume that the act was as a matter of fact performed. Where the question is whether there was any affixture at all of the attachment order on the properties sought to be attached and there is no reliable evidence as to the act of affixture the party cannot prove the affixture by relying on the presumption under the Evidence Act. Also, in such a case it is discretionary for the Court to rely on the presumption and it may refuse to do so where the party 'seeks it long after all the material evidence on the point has ceased to be available.' "

Here, in our case, I have already stated that there is no evidence on the side of the respondents with regard to compliance of the relevant rules. On the other hand, it is clear from the evidence of P.W.1 and



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Ex.P-10 that the attachment order has not been re-communicated to the Sub-Registrar's office with relevant and correct particulars."

(iii) 2008 (6) CTC 636 = 2008 (4) LW 1111 = 2009 (2) Mad.L.J. 473 =

2008 SCC Online Madras 719 (S.S.Karthikeyan Vs. Sivasalam and another):

"10. Law is well settled that till a dispute is finally adjudicated and settled, stay of further proceedings in the Execution Petition has to be made, provided that the Claim Petition is filed by a *bona fide* person, which is necessary for the disposal of the Claim Petition and in such circumstances, the Court ought to have decided the Stay Petition taking into consideration that the order of attachment over the petition mentioned property is based on the Encumbrance Certificate; if it is not reflected, then the Court has to consider the matter by taking into account the material evidence. The provision under Section 58 of Order 21, C.P.C. makes it very clear that where an claim is preferred or any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions contained therein. Also, the provisions make clear that this objection is subject to certain conditions. More so, the amended Rule 58-A also provides that the order of attachment as well as the order raising the attachment by removal, determination or removal passed under Rule 55 shall be communicated to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such order is situate. The above provisions have to be made applicable to the case on hand, but the Court below, without looking into the provisions and records, particularly the Encumbrance Certificate, has simply rejected the



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said petition."

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11. Therefore, according to the learned counsel for the second respondent, though the trial Court failed to appreciate the evidence and dismissed the claim petition, but the first appellate Court had rightly re-appreciated the entire evidence and gave independent finding that the said Chellamuthu was the bona-fide purchaser and as legal heir of the Chellamuthu, the second respondent is entitled to the relief sought for in the claim petition in E.A.No.3 of 2003 in E.P.No.8 of 2002 in O.S.No.172 of 2000. Therefore, the present Second Appeal may be dismissed.

12. Heard both sides and perused the materials available on record.

13. Though at the admission stage, this Court has not formulated the question of law, however, on hearing the appeal, this Court takes into consideration the substantial questions of law mentioned in the ground of the present CMSA.

14. As far as the first substantial question of law is concerned, admittedly,

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the appellant filed the suit against the third respondent in O.S.No.172 of 2000 and pending the suit, he also filed I.A.No.299 of 2000. Though Ex.R-1 shows that the third respondent has given an undertaking not to sell the property, based on that, I.A.No.299 of 2000 was closed, but subsequently, the first appellant obtained an ex-parte decree against the third respondent and he filed an Execution Petition in E.P.No.8 of 2002, and when the same was pending, the respondents 1 and 2 filed E.A.No.3 of 2003 under Order 21 Rule 58 CPC and the Executing Court dismissed the said E.A., against which, the respondents 1 and 2 filed appeal before the first appellate Court in A.S.No.94 of 2004, which was allowed, against which, the appellate/decreree-holder in the suit, is before this Court by way of the present CMSA.

15. The main contention of the first appellant is that since he has filed the suit against the third respondent even in the year 2000 itself and also filed I.A. under Order 38 Rule 5 CPC, in which the third respondent gave an undertaking, but pending the 'lis', the third respondent sold the property to one late Chellamuthu and therefore, the sale is hit by Section 53 of the Transfer of Property Act. For better understanding, Section 53 is extracted hereunder:

"Section 53: Fraudulent transfer.--(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for



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consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term include a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

16. Therefore, on a careful perusal of the entire materials and also on a reading of Section 53 extracted above, it is seen that respondents 1 and 2 have established that the said Chellamuthu was not aware of any of the litigation between them and also the loan transaction and as per the evidence of P.W.2 and also as per the recitals of Ex.P-1 sale deed executed in favour of the said Chellamuthu on 04.10.2000 by the appellant, it clearly shows that the said Chellamuthu was not aware of any of the loan transaction or the undertaking or even the attachment or any decree passed.



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17. The first appellant has also not established that the transaction between the third respondent and the said Chellamuthu was a fraudulent transaction and only in order to defeat the claim of the first appellant, the said Chellamuthu entered into a sale transaction with the third respondent/judgment-debtor in the said suit. Therefore, in the absence of the same and the transaction between the said Chellamuthu and the third respondent having been not hit by the provisions of Section 53 of the Transfer of Property Act, and when once the respondents 1 and 2 have established that the said Chellamuthu is a bona-fide purchaser, whereas the evidence shows that the first appellant has not established that he was not a bona-fide purchaser and only in order to defeat the claim of the first appellant, he made the sale transaction and therefore, as pointed out in the decisions quoted above, relied on by the learned counsel for respondents 1 and 2, there is no entry in the Encumbrance Certificate/Register maintained by the Sub-Registrar Office and also if at all the property is attached and that there should be certain procedures to be followed as pointed out in the decisions referred to supra by the learned counsel for the respondents 1 and 2, there is no entry in the Encumbrance Certificate/Register maintained by the Sub-Registrar Office and also if at all the property is attached and that there should be certain procedures to be followed as pointed out in the decisions referred to by the learned counsel for the respondents 1 and 2. In this case, admittedly, there is no attachment and the same was not proclaimed in the manner known



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to law as contemplated in the Code of Civil Procedure and the Civil Rules of Practice.

18. Therefore, in the above circumstances, in the absence of any material to show that the said Chellamuthu was aware about the loan transaction or the suit having been filed pending between them and the undertaking/attachment and that the said Section 53 of the Transfer of Property Act, would not get attracted. The first appellant has not established that Chellamuthu was aware of the same and even otherwise also, the first appellant has not also established that the Chellamuthu was aware of even the appeal and stated that he issued notice to Chellamuthu not to purchase the property, but there are no such pleadings in his counter statement filed before the Executing Court in E.A.No.3 of 2003 and there is also no material produced by the first appellant to show that he has already sent the legal notice to the said Chellamuthu, which was acknowledged by the same, despite the fact that the said Chellamuthu knowing fully well, purchased the property and therefore, it is fraudulent transaction and it is hit by law.

19. Therefore, in the absence of the same, this Court finds that though the Executing Court failed to appreciate the evidence and dismissed the claim application filed by the appellant in E.A.No.3 of 2003, whereas, the appellate

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Court as a final Court of fact-finding, re-appreciated the evidence and allowed the appeal and declared that Chellamuthu was the bona-fide purchase for valuable consideration without any notice of defective title. The first substantial question of law is answered in the above terms.

20. As far as the second substantial question of law is concerned, as already discussed above, there is no material to show that Chellamuthu was aware about the undertaking given by the third respondent and after taking note of the undertaking given by the third respondent before Court, the said Chellamuthu colluded with the third respondent and in order to defeat the claim of the decree-holder, namely the first appellant herein. Therefore, as discussed elaborately in the earlier substantial question of law and also the decisions referred to by the learned counsel for the second respondent, absolutely there is no material to show that Chellamutu was aware about the undertaking or the dispute or was he aware of the loan transaction or the suit pending or the attachment or the undertaking given by the third respondent before Court not to sell the property.

21. Therefore, in the absence of any materials, this Court finds that the appellate Court has rightly re-appreciated the evidence and set aside the order of the Executing Court and allowed the claim petition filed by the appellant.

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From the evidence of P.W.2 and also Ex.P-1 sale deed, and also the evidence of R.W.1, it is seen that the appellant has not established that Chellamuthu was not the bona-fide purchaser and he colluded with the third respondent after knowing the undertaking and hence, the second substantial question of law is answered accordingly against the appellant. There is no merit in the present Second Appeal.

22. Yet another fact to be noted is that there are two properties shown in the schedule to the application in I.A.No.299 of 2000 in O.S.No.172 of 2000. The said Chellamuthu purchased only one of the properties and if at all the Chellamuthu colluded with the third respondent, in order to defeat the claim of the first appellant, he entered into fraudulent transaction and he could have purchased both the properties under Ex.P-1 and it is only one of the properties which have been alienated. Even the first appellant has not stated the worth of the two properties. The properties which are not covered under the application, are only lesser in value than the value of the realising of the decree. The properties covered under Ex.P-1 is more worth and value than the consideration stated in Ex.P-1.

23. Therefore, considering the entire facts and circumstances, this Court finds that there is no merit in the present CMSA and it deserves to be dismissed. Accordingly, the present CMSA is dismissed. The judgment and decree of the first appellate Court are confirmed. There shall be no order as to costs. The



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miscellaneous petition in C.M.P.No.5595 of 2005 is closed.

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To

1. The Principal District Judge, Villupuram.
2. The Subordinate Court, Kallakurichi.
3. The Section Officer, V.R. Section, High Court, Madras.

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CS

Pre-delivery Judgment in

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