IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2024

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

CRP.No.224 of 2021 and
C.M.P.No.2110 of 2021

A.Chinnasamy ... Petitioner

Vs.

1.Syedshah
Rep. By his Power Agent
Heera Begum
Vaikkalmettu Street
Kallakurichi, Kallakurichi Taluk,
Villupuram District.

2.Senthil Kumar ...Respondents

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India, praying to set aside the fair and decreetal order dated 09.12.2020 in I.A.No.506 of 2016 in O.S.No.343 of 2014 on the file of the Principal Sub-Ordinate Court, Kallakurichi, Villupuram District.

For Petitioner : M/s.K.Selvaraj

For Respondent 1 : Mr.R.Jaya Prakash
For Respondent 2 : Not ready in notice

ORDER

The Civil Revision Petition is filed challenging the order passed by the Trial Court allowing the application filed by the 1st respondent seeking raising of attachment before judgment.

2.The petitioner herein filed a suit for recovery of money against the 2nd respondent. Pending suit, he filed an application in I.A.No.987 of 2014 seeking attachment before judgment of the property belonging to the 2nd respondent. In the said application, notice was ordered to the 2nd respondent. The 2nd respondent entered into sale agreement to convey the property, in respect of which attachment was sought for, in favour of power agent of the 1st respondent and his mother, Heera Begum. On acquiring knowledge about the said agreement, the petitioner's counsel issued a notice to said Heera Begum on 01.12.2014 informing her about the suit for recovery of money filed by him against the respondent in O.S.No.343 of 2014 and the pendency of the petition filed by him for attachment before judgment against the property in respect of which agreement of sale was entered by her with 2nd respondent. After receipt of said notice, the power agent of the 1st respondent, Heera Begum issued a reply to petitioner's counsel on 20.12.2014 stating that the registered sale agreement entered between her and 2nd respondent on 20.10.2014 was cancelled on 10.12.2014. Thereafter, the Trial Court passed an order of attachment before judgment in I.A.No.987 of 2014 in O.S.No.343 of 2014 on 22.02.2016. Subsequently, the 1st respondent herein filed instant application in I.A.No.506 of 2016 seeking raising of attachment on the ground that he purchased the said property from 2nd respondent on 10.12.2014 itself. Therefore, the 1st respondent prayed for raising of attachment mainly on the ground that he got the sale deed in his favour even prior to the date of attachment.

3. The Court below by impugned order allowed the application filed by the 1st respondent on the ground that he purchased the property even prior to the attachment and hence, raised the attachment. In the case on hand as narrated above, when pendency of the suit as well as petition for attachment before judgment were brought to the notice of 1st respondent's power agent and his mother, Heera Begum, by way of legal notice issued by petitioner's

counsel, she sent a reply on 20.12.2014 stating that agreement of sale entered by her with 2nd respondent was cancelled on 10.12.2014. From the acknowledgement card filed in the typed set of papers, it is clear that the above notice was received by power agent of 1st respondent on 04.12.2014. Subsequently, the 1st respondent herein filed the present claim petition seeking raising of attachment on the ground that he purchased the property on 10.12.2014 itself.

4. Assailing the impugned order, the learned counsel for the petitioner submitted that the sale deed executed in favour of 1st respondent by the 2nd respondent on 10.12.2014 is a fraudulent transfer hit by Section 53 of Transfer of Property Act and hence, the petitioner is entitled to ignore the same. In support of his contentions, the learned counsel relied on the judgment of this Court in the case of ***Kalyaniammal Vs Punjab National Bank by its Manager, Tirunelveli Town and Others reported in AIR 1992 Mad 176.*** The learned counsel submitted that the Trial Court, without considering the effect of Section 53 of Transfer of Property Act, on an erroneous view, allowed the petition for raising of attachment on the ground that 1st respondent purchased

the property even prior to the attachment order. It is the submission of the learned counsel that 1st respondent purchased the suit property having full notice of the suit and pendency of the attachment before judgment application and hence, he cannot be treated as a *bonafide* purchaser.

5. The learned counsel for the 1st respondent by taking this Court to the order passed by the Trial Court submitted that the Trial Court rightly came to the conclusion that purchase made by the 1st respondent prior to attachment will prevail over the attachment order and consequently, correctly raised the attachment order.

6. In the light of the submissions made by the learned counsel for the petitioner and 1st respondent, the crux of the matter is whether the plea of fraudulent transfer raised by the petitioner can be gone into in a petition filed by the 1st respondent to raise the attachment. In the counter affidavit filed to the instant application filed by the 1st respondent for raising of attachment, the petitioner referred to the exchange of notice between petitioner and mother and power agent of 1st respondent, Heera Begum and knowledge of 1st

respondent's mother and power agent, Heera Begum about the pendency of the suit and attachment before judgment application. There is a clear plea by the petitioner that the transaction entered into by the 1st respondent with the knowledge of attachment before judgment petition is a fraudulent one with the aim to defeat the rights of the petitioner/creditor.

7. In ***N.N.L Ramaswami Chettiar Vs Mallappa Reddiar reported in AIR 1920 Mad 748= ILR (1920) 43 Mad 760,*** a five member bench of this Court held that in a suit filed by the transferee to establish his title under Order XXI Rule 63 (now deleted), it is open to the attaching creditor to plead and raise a defense that the transfer was to de-fraud the creditors. The relevant observation of the Presiding Judge of the Bench namely Chief Justice Sir John Wallis reads as follows:-

> “ *The actual question referred to us is whether it is open to an attaching decree-holder to plead in defence to a suit by the alienee whose claim has been rejected that the transfer to him was fraudulent under Section 53. For the reasons already given, I am of opinon that it is open to the judgment-creditor by virtue of Section 53 of the Transfer Property Act to attach as the property of the*

judgment-debtor property which has been fraudulently transferred to the claimant with intent to defeat or delay creditors. If he knows of the transfer when he applies for attachment the application is sufficient evidence of his intention to avoid it; if he only hears of the transfer when a claim petition is preferred under Order XXI, Rule 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid and entitles him to succeed in the subsequent suit under Rule 63 which has next to be considered"

8. The other learned Judges of the Bench concurred with the view expressed by the Presiding Judge of the Bench. Hence, the five member bench of this Court by unanimous decision held that in an action by the transferee to establish his title, the attaching creditor can very well raise defense of fraudulent transfer under Section 53 of Transfer of Property Act. In the case on hand, in the counter affidavit filed by the petitioner in response to the petition filed by the 1st respondent seeking raising of attachment, the petitioner clearly raised the defense of fraudulent transfer and the same has not been considered by the Trial Court in proper perspective.

9. ***In Sami Asari Vs Adinam Ashagiya Pillai and another reported in AIR 1921 Madras 657,*** a Division Bench of this Court following the view of the above mentioned five member bench of this Court observed as follows:-

> *"..............The Full Bench decision in S.A.No.504 of 1919 has now established that the avoidance by a creditor need not be by a suit brought on behalf of all the creditors or even by that one creditor and that an open and unequivocal declaration of the intention to avoid it expressed by a creditor is sufficient in law to enable him to treat it as void and to take steps on that footing to enforce his rights as a creditor for obtaining satisfaction of his debt. The declaration can, of course, be made by open unequivocal conduct................."*

10. Order XXXVIII Rule 8 of Code of Civil Procedure enables adjudication of the claim made by a third party to the property attached before judgment. The said provision reads as follows:-

> ***"Adjudication of claim to property attached before judgment-****Where any claim is preferred to*

property attached before judgment, such claim shall be adjudicated upon in the manner herein before provided for the adjudication of claims to property attached in execution of a decree for the payment of money".

11. A perusal of above rule would make it clear that the adjudication shall be made in accordance with the provision for adjudication of claims to a property attached in execution. Order XXI Rule 58 of CPC provides for adjudication of claims in respect of properties attached in execution and the same reads as follows:-

*"**58. Adjudication of claims to, or objections to attachment of, property.**—(1) Where any claim is preferred to, 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 herein contained :*

Provided that no such claim or objection shall be entertained—

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(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.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination,—

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (I), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such-suit, if any, an order so refusing to entertain the claim or objection shall be conclusive".

12. A reading of Order XXI Rule 58 (2) of CPC would make it clear that

all questions including questions relating to right, title or interest in the property attached arising between the parties to a proceeding or their representatives and relevant to the adjudication of the claim shall be determined by the Court dealing with the claim or objection and not by a separate suit. In the case on hand, the petitioner herein, pending suit for recovery of money filed against 2nd respondent, attached the property of 1st respondent by filing attachment before judgment petition. A claim has been made by the 1st respondent on the ground that he purchased the property from the 2nd respondent even before attachment order. The petitioner herein challenged the said petition on the ground that the transfer made by the 2nd respondent in favour of 1st respondent was a fraudulent transfer aimed at delaying or defeating the rights of the petitioner/creditor and hence, hit by Section 53 of Transfer of Property Act. Whether the 1st respondent got good title under sale deed executed by 2nd respondent would depend on consideration of the plea of fraudulent transfer raised by the petitioner. It is settled law that after 1976 amendment to Civil Procedure Code, a claim made under Order XXI Rule 58 shall be adjudicated upon as if it is a regular suit and any adjudication on the rights of the parties will be treated as a deemed decree.

The right, title or interest of the 1st respondent over the attached property is inextricably mixed up with the plea of fraudulent transfer raised by the petitioner. The five member bench of this Court in ***Ramaswami Chettiar case*** cited supra held that in an action for establishment of title by the transferee, the attaching creditor is entitled to raise a defense that the transfer was to defraud the creditor. Therefore, in an application filed to raise attachment, the petitioner is entitled to raise the defense of fraudulent transfer. After all, the petition to raise attachment is filed by the 1st respondent based on his title under the sale deed executed by 2nd respondent. Certainly, it is an action to establish his title and therefore, the petitioner is entitled to raise the plea of fraudulent transfer.

13. In view of Order XXI Rule 58(2) of CPC, all questions relating to the right, title or interest in the property attached arising between the parties or their representatives shall be decided in the claim petition itself and not by separate suit. Therefore, there is no need for the petitioner to file a separate suit to get a declaration of fraudulent transfer and he can raise the plea of fraudulent transfer in a petition filed by 1st respondent to raise attachment and

the same shall be adjudicated upon as per the mandate of Order XXI Rule 58(2) of CPC.

14. The above conclusion reached by me is fortified by decision of this Court in ***Kalyaniammal Vs Punjab National Bank by its Manager, Tirunelveli Town and Others reported in AIR 1992 Mad 176.*** The relevant observation in the above mentioned case law reads as follows:-

> *"7. What is stated above, is sufficient to show that there is no bona fide in the case put forward by the appellant. The case of the appellant has to be rejected even on the basis of the evidence adduced by herself and by Velayutha Ganesan, examined as P.W. 3. The court below has rightly taken into account the aforesaid evidence and come to the conclusion that the claim made by the appellant is not bona fide and the alleged sale in her favour was only in fraud of the creditors. The appellant cannot be said to be a bona fide purchaser for value in good faith. Consequently, the conclusion of the court below on facts, is correct.*
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> *8.....*
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> *9.....*
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> *10.......After the amendment by Act 104 of 1976, all questions relating to properties, including the question of*

title, have to be decided only in the claim proceedings. Under Rule 58 of Order XXI, Code of Civil Procedure, 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 that 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. Under the same rule, it has been provided that such adjudication shall have the same force and be subject to the same conditions as to appeal or otherwise, as if it were a decree......"

15. In the case on hand, the petitioner filed a suit for recovery of money against 2nd respondent on 01.12.2014. He also filed an application for attachment before judgment in I.A.No.987 of 2014 on 01.12.2014 and the notice was ordered to 2nd respondent in that application. The same was brought to the notice of 1st respondent's mother and his power agent, Heera Begum by legal notice issued by petitioner's counsel on 01.12.2014 which was received by 1st respondent's power agent on 03.12.2014 as seen from Ex.R1 and Ex.R2. Thereafter, the 1st respondent's power agent issued reply notice under Ex.R3

dated 20.12.2014 stating that sale agreement entered between her and the 2nd respondent on 20.10.2014 was cancelled and hence, the suit filed by the petitioner and the pending attachment before judgment petition will not affect her rights. The said reply was given by 1st respondent's power agent on 20.12.2014 stating sale agreement in her favour was cancelled on 10.12.2014. However, it appears on the very same date after cancelling the sale agreement in her favour, mother and power agent of the 1st respondent got the sale deed in the name of 1st respondent. The document cancelling the sale agreement in her favour and the sale deed in favour of the 1st respondent were marked as Ex.P1 and Ex.P2 through 1st respondent's power agent, Heera Begum, who was examined as P.W.1 in the claim petition. The 1st respondent's power agent, Heera Begum, clearly admitted the receipt of notice, reply by her, cancellation of sale agreement in her favour and sale in favour of her principal and son, the 1st respondent herein.

16. It is settled law that knowledge of the agent is knowledge of the principle. Further, in the case on hand, the power agent of the 1st respondent is none other than his mother. It is seen from the proof affidavit filed by the power agent of the 1st respondent, Heera Begum, who was examined as P.W.1

and the affidavit filed in support of the claim petition, both 1st respondent and his power agent, Heera Begum are residing at same place. In fact, the claim petition also supported by sworn affidavit of power agent of 1st respondent. In such circumstances, the Court below ought to have examined the question of fraudulent transfer raised by the petitioner.

17. In the impugned order, the Trial Court held that there is no evidence available on record to show that 1st respondent had knowledge of pendency of the suit and attachment before judgment petition. In the light of the above overwhelming circumstances pointed out, the said conclusion reached by the Trial Court is not acceptable to this Court. The evidence available on record is sufficient to come to a conclusion that 1st respondent had knowledge of the pendency of the suit as well as the attachment before judgment petition. Therefore, the order impugned in this revision is set aside and the matter is remanded back to the Trial Court with direction to consider the question whether the transfer in favour of 1st respondent is a fraudulent transfer hit by Section 53 of Transfer of Property Act by affording ample opportunity to both the parties by following procedure under Order XXXVIII Rule 8 read with

Order XXI Rule 58 of Civil Procedure Code.

18. In view of the settled law, any claim petition shall be treated as a suit and adjudication on claim petition is deemed decree, this Court feels that the matter should be remitted back to the file of the Trial Court with direction to re-consider the issue in the light of the points discussed above.

19. In ***Hamda Ammal Vs Avadiappa Pathar and 3 Others reported in (1991) 1 SCC 715,*** the Hon'ble Apex Court held that if the transfer had taken place prior to order of attachment before judgment, the same will not affect the rights of the transferee. However, that was not the case wherein the plea of fraudulent transfer was raised by the attaching creditor. In fact, even in the said judgment, the Hon'ble Apex Court held that if the creditor wants to assail the transfer under Section 53 of Transfer of Property Act, the same would be a different case. The relevant observation of the Hon'ble Apex Court reads as follows:-

> "*A transaction of sale having already taken place even prior to the institution of a suit cannot be said to have been made with the intention to obstruct or delay the*

execution of any decree. It would be a different case altogether if a creditor wants to assail such transfer by sale under Section 53 of the Transfer of Property Act, 1882 (hereinafter referred to as "the Act") on the ground of a fraudulent transfer. Such suit would be decided on totally different considerations in accordance with the provisions of Section 53 of the Act".

20. Therefore, the above judgment of the Hon'ble Apex Court also fortifies the conclusion reached by this Court. The plea of fraudulent transfer raised by the petitioner shall be looked into afresh.

21. In view of the discussions made earlier, the order impugned in this revision raising the attachment is set aside and the matter is remitted back to the file of Trial Court with direction to dispose of I.A.No.506 of 2016 filed by the 1st respondent to raise attachment after giving ample opportunity to both the parties, in accordance with law, in the light of the observations made above. In view of allowing of revision by setting aside the order raising attachment, earlier order of attachment before judgment passed by Trial Court gets revived pending consideration of I.A.No.506 of 2016 afresh. The revival of attachment order shall be entered in the records of concerned Sub-Registrar,

having jurisdiction over the area in which subject matter of attachment is situated. The Registry is directed to communicate this order to the Sub-Registrar No.I, Kallakurichi along with copy of final order in I.A.No.506 of 2016 in O.S.No.343 of 2014, on the file of Principal Sub-Court, Kallakurichi to enable him to identify the property based on description of property found there on.

22. With these observations, this Civil Revision Petition stands allowed with directions. Consequently, the connected miscellaneous petition is closed. No costs.

05.03.2024

Index : Yes
Internet : Yes
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Note:
Copy of this order may be sent to the Sub-Regisrar-I, Kallakurichi along with copy of order in I.A.No.506 of 2016 in O.S.No.343 of 2014, on the file of Principal Sub-Court, Kallakurichi.

To

1. The learned Principal Sub-Ordinate Judge,
   Kallakurichi, Villupuram District.

2. The Sub-Registrar-I, Kallakurichi.

S.SOUNTHAR , J.

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