



C.M.S.A.(MD)No.26 of 2012

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 20.03.2024

Delivered On : **19.06.2024**

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.M.S.A.(MD)No.26 of 2012

A.Balamurugan

... Appellant

Vs.

1.Balasubramanian

2.Irulappan

3.Essakkiammal

4.Ponraj

... Respondents

PRAYER : Civil Miscellaneous Appeal is filed under Section 100 of Civil Procedure Code r/w. Order 21 Rule 58 of Civil Procedure Code, to set aside the judgment and decree in C.M.A.No.64 of 2006 passed by the learned First Additional District Judge, Tirunelveli dated 05.07.2007 confirming the decree and judgment passed in E.A.No.42 of 2005 in E.P.No.1 of 2002 in O.S.No.93 of 2000 dated 13.09.2006 by the learned Subordinate Judge, Ambasamudram.

For Appellant : Mr.Ananth C.Rajesh

For 4th Respondent : Mr.H.Arumugam

For Respondents 1 to 3 : No Appearance

JUDGMENT

This Civil Miscellaneous Second Appeal has been filed against the judgment and decree passed in C.M.A.No.64 of 2006 passed by the learned



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First Additional District Judge, Tirunelveli dated 05.07.2007 confirming the decree and judgment passed in E.A.No.42 of 2005 in E.P.No.1 of 2002 in O.S.No.93 of 2000 dated 13.09.2006 by the learned Subordinate Judge, Ambasamudram.

2.The unsuccessful petitioner before the Courts below is the appellant before this Court. The facts which form the prelude to the filing of this Appeal is set out in the chronology of dates and events given herein below:-

Sl.No.	Date	Descriptions
1.	Year' 2000	1 st Respondent/plaintiff/Balasubramaniam filed a suit in O.S.No.93 of 2000, on the file of the Sub Court, Ambasamudram, against the 2 nd and 3 rd respondents/defendants who are brother and mother of Appellant's vendor namely Murugesan for recovery of money
2.	25.10.2000	I.A.No.371 of 2000 – ABJ Ordered (Attachment before Judgment)
3.	Year' 2001	Suit in O.S.No.93 of 2000 was decreed
4.	.01.2002	E.P.No.1 of 2002 filed by the first respondent/plaintiff/decreed holder for sale of property in auction
5.	17.03.2003	One Murugesan (Vendor of appellant/claimant) filed a claim petition in E.A.No.69 of 2003 under Order 21 Rule 58 of CPC to set aside the order of ABJ passed in I.A.No. 371 of 2000. (First Claim Petition)
6.	19.02.2002	Murugesan gave power to one Arumugapandian
7.	11.11.2003	Arumugapandian (Power Agent) sold the suit property to the appellant/claimant namely Balamurugan under Ex.P3 pending the above claim petition in E.A.No.69 of 2003
8.	20.09.2004	E.A.No.69 of 2003 instituted by appellant's vendor namely Murugesan dismissed for default



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9.	06.01.2005	E.A.No.42 of 2005 – Second Claim petition filed by appellant/claimant – Pendente lite after ABJ and pending Execution proceedings (Second Claim Petition)
10.	13.09.2006	E.A.No.42 of 2005 - Dismissed
11.	17.11.2006	Court auction sale conducted - 4 th Respondent /Court auction sale purchaser is the successful bidder – Sale certificate issued
12.	15.11.2005	E.A.No.108 of 2008 filed by the 4 th respondent for taking delivery
13.	20.11.2005	C.M.A.No.64 of 2006 on the file of the learned 1 st Additional District Judge, Tirunelveli filed by the appellant/Claimant against the order in E.A.No.42 of 2005
14.	05.07.2007	C.M.A.No.64 of 2006 dismissed
15.	05.11.2008	E.A.No.108 of 2008 filed by 4 th respondent/Court auction sale purchaser was allowed and delivery taken
16.	05.11.2008	E.A.No.138 of 2008 filed by appellant/claimant under Order 21 Rule 97 was dismissed (Third Claim Petition)
17.	31.01.2012	Delivery taken by 4 th respondent/Auction sale purchaser and he is in possession of the property

3.The parties herein are referred to in the same rank as in E.A.No.42 of 2005.

4.The crux of the claimant's case is as follows:-

The property in dispute is comprised in Natham Survey No. 369/2A1A of West Ambasamudram village with a building bearing door No.7/17 of Ambasamudram Town panchayat. Originally, it belonged to one Kailasa Iyer. On 25.11.1959, he alienated the same to one Palanisamy Pulavar under Ex.P1. Palanisamy Pulavar's wife is one Esakkiammal, the third respondent/second



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defendant. Palanisamy Pulavar was survived by his wife Esakkiammal, sons Murugesan, Irulappan, Nagarajan and a daughter Amuthavalli. On 01.09.1997, he executed a registered Will (Ex.P6) regarding the said property and another. The petition schedule property was bequeathed to Murugesan and the second item of the property in the said Will (Ex.P6) was bequeathed to his only daughter Amuthavalli excluding the other two sons, namely, Irulappan and Nagarajan. During 1998, Palanisamy Pulavar died and the Will came into effect. Murugesan, the legatee of the disputed property, executed Ex.P2 power of attorney in favour of one Arumugapandiyan. On 11.11.2003, the said power of attorney, namely, Arumugapandiyan, had sold the property to the claimant under Ex.P3 sale deed. The claimant/Balamurugan came to know of E.P.No.1 of 2002 only on 23.12.2004 through the power of attorney of his vendor, namely, Arumugapandiyan. Hence, on 06.01.2005, the claimant/Balamurugan filed E.A.No.42 of 2005 in E.P.No.1 of 2002 in O.S.No.93 of 2000. However, the learned Trial Court dismissed the same on 13.09.2006. Against which, he preferred C.M.A.No.64 of 2006 on the file of the learned First Additional District Judge, at Tirunelveli, on 20.11.2006. Later, on 05.07.2007, the said Civil Miscellaneous Appeal came to be dismissed. Assailing the same, this Civil Miscellaneous Second Appeal came to be filed by the appellant/claimant/third party.



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5.The crux of the case of the decree holder is as follows:-

One Bala Subramaniam filed O.S.No.93 of 2000 against Palanisamy Pulavar's widow Esakkiammal and one of his sons, namely, Irulappan, during the year 2000. Along with the said suit, he had filed an Interim Application in I.A.No.371 of 2000 seeking attachment before judgment and accordingly, on 25.10.2000, the learned Subordinate Judge, Ambasamudram, passed an order of attachment before judgment with respect to the suit schedule property, that is, the petition schedule property herein on 25.10.2000. Later, the suit was decreed in favor of the plaintiff. Following which, the decree holder/plaintiff filed E.P.No.1 of 2002 in O.S.No.93 of 2000 for sale of the petition schedule property in auction. While so, Murugesan, the alleged legatee under the Will of Palanisamy Pulavar had filed E.A.No.63 of 2003 claiming right over the disputed property. On 20.09.2004, the said EA filed by Murugesan was dismissed. The claimant during the pendency of E.A.No.63 of 2003 had purchased the petition schedule property without any lawful basis and with full knowledge of the proceedings.

6.The first judgment debtor/first defendant/second respondent has filed a counter supporting the case of the plaintiff/decreed holder, negating the



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contention of the vendor of the claimant, that is, his brother Murugesan. The claimant Bala Murugan was examined as P.W.1 and one Rangarajan was examined as P.W.2 on the side of the petitioner and Ex.P1 to Ex.P6 were marked on the side of the petitioner. On the side of the respondent, Bala Subramaniam, that is, the decree holder was examined as R.W.1 and Ex.R1 to Ex.R7 were marked on the side of the respondents.

7.The learned Trial Court observing that the claimant while deposing his evidence as P.W.1 in his examination has admitted that, he had full knowledge as to the E.A. in E.A.No.69 of 2003 filed by his vendor Murugesan and that the same was later dismissed and on that basis came to a conclusion that, the claimant had full knowledge as to the pendency of E.P.No.1 of 2002 in O.S.No. 93 of 2000 and also the fact that his vendor had already filed an E.A. petition in the aforesaid E.P. with respect to the petition schedule property seeking to raise the attachment and that the same was also later dismissed. Considering the various discrepancies in the evidence of P.W.1, the learned Trial Court came to a conclusion that his evidence is not reliable. On perusal of the various documents marked before the learned Trial Court, the learned Sub Judge observed that the vendor of the claimant during the pendency of the execution petition has entered into an agreement for sale on 01.12.2000 with one



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Krishnan which is marked as Ex.R5 and another agreement for sale in favour of one Bharathi, wife of Arumugapandian, that is, his power of attorney holder on 19.07.2002 which is marked as Ex.R6. The aforesaid documents marked as Ex.R5 and Ex.R6 would reveal the intention of the vendor of the claimant to create encumbrance with respect to the petition schedule property. Further, the learned Trial Court observing that the genuinity of the alleged Will dated 01.09.1997, which has been marked as Ex.P6, which was executed by Palanisamy Pulavar in favour of his son Murugesan and daughter Amuthavalli, has been questioned by his yet another son namely, Irulappan, that is, the second respondent/first defendant and the learned Trial Court proceeded to conclude that the claimant has examined only one of the attesting witnesses in the aforesaid Will and the claimant's failure to examine the other attesting witness of the aforesaid Will Ex.P6 despite the said person being alive, has not been properly explained and hence, the claimant has miserably failed to prove the genuinity of the Will. On that basis, the learned Trial Court proceeded to dismiss E.A.No.42 of 2005 on 13.09.2006.

8.Assailing the said order, the claimant further preferred C.M.A.No.64 of 2006 before the learned I Additional District Judge, at Tirunelveli. The learned First Appellate Court categorically observing that Ex.P3 sale deed in favour of



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the claimant executed by the power of attorney holder of Murugan, that is, the eldest son of Palanisamy Pulavar is hit by the doctrine of *lis pendens* within the meaning of Section 52 of Transfer of Property Act and proceeded to dismiss the aforesaid C.M.A., for the reason that, on the basis of the said Ex.P3, the claimant is not entitled to interfere with the execution proceedings by claiming title in his favour.

9.Challenging the same, the claimant has further filed this Civil Miscellaneous Second Appeal before this Court. On 03.03.2021, the following substantial questions of law were framed for the determination of this Appeal by this Court:-

“(I)Whether the lower Appellate Court was right in concluding that the bar contemplated under Order 9 Rule 9 of the Code of Civil Procedure would apply to prevent the appellant from establishing his right over the property by way of an application under Order 21 Rule 58 of the Code of Civil Procedure?

(II)Whether it can be said that the dismissal of E.A.No.69 of 2003 filed by the vendor of the petitioner would bar the petitioner from making an independent claim?”

Submissions:-

10.The learned counsel appearing for the appellant submitted that the Lower Courts failed to consider the vital fact behind the case that, the suit



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property was transferred in the name of one Murugesan through a registered Will (Ex.P6) much earlier to the institution of the suit in O.S.No.93 of 2000.

Without ascertaining the fact that the said Palanisamy Pulavar who executed the registered Will dated 01.09.1997 died in the year 1998 and hence, the same came into effect and the beneficiaries, that is, the legatees under the said Will has become the absolute owners of the properties under the Will. Thus, the learned counsel contended that the institution of the suit and the attachment of the other person's property in I.A.No.371 of 2000 before judgment is against law and the same is not executable. He further contended that though one of the attesting witnesses to the aforesaid Will Ex.P3 was examined as a witness as P.W.2 before the learned Trial Court, the learned Trial Court ought not to have negated the genuinity of the claim made by the claimant. He further insisted that pursuant to the sale deed Ex.P3 in favor of the appellant mutation with respect to the petition schedule property has also been affected in his name. The learned counsel assailed the judgment of the first Appellate Court that while deciding the case, deviating from the pleadings the First Appellate Court has given findings exclusively on its assumption and presumption without analyzing the real case in hand and contended that the judgment and decree passed in C.M.A.No.64 of 2006 is fully erroneous. He further contended that the First Appellate Court ought to have converted the Civil Miscellaneous



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Appeal as one filed under Section 96 of the Code of Civil Procedure, since the claim petition filed under Order 21 Rule 58 is to be proceeded as a trial and should pass a decree. He assailed both the Lower Courts that even before the claim petition of the appellant attained its finality, the learned Trial Court had allowed the fourth respondent to take delivery of the petition schedule property. Further, as a result of the complaint given by the tenants in the petition schedule property to the police, the Executing Court has not closed the Execution Petition in E.P.No. 1 of 2002 so far and the same is pending. On that basis, he pressed for allowing the Appeal.

11.Despite several opportunities given to the learned counsel for the respondents 1 to 3 to appear and argue the matter, there was no representation for the respondents 1 to 3 on 08.12.2023 and 14.12.2023.

12.However, the learned counsel for the fourth respondent, that is, the auction purchaser submitted that the client petitioner's vendor namely Murugesan who claimed title over the suit property through registered Will (Exp6) dated 01.09.1997 has filed a claim petition under Order 21 Rule 58 of C.P.C., in E.A.No.69 of 2003 before the Executing Court and the same was dismissed for default on 20.09.2004 and thereafter he had not chosen to restore



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the same and claim his right over the property. Hence, he insisted that the claimant is thus precluded from filing a fresh claim application under the same cause of action, without having any merits or bona fide under law.

13.Relying upon the case reported in the case of ***Bharathidasan v. Shanmugavel*** reported in ***2020 (1) CTC 321***, the learned counsel submitted that the second claim petition filed by the claim petitioner for the same cause of action under which his vendor had already filed a claim petition which has been dismissed for default is not permissible under law. On that basis, he categorically contended that the second claim petition filed by the claim petitioner is hit by Order 9 Rule 9 read with Section 12 of the Code of Civil Procedure, 1908.

14.The learned counsel further submitted that in normal course, the third party to a decree who claims an independent right or title can invoke Order 21 Rule 97 and 98 of C.P.C., resisting or obstructing to the possession of immovable property and the said application has to be decided including all the questions relating to the right, title and interest of the property as per Order 21 Rule 101 of C.P.C. Interestingly, in this case the claimant has also filed yet another E.A.No.138 of 2008 invoking Order 21 Rule 97 before the learned



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Trial Court and the same was also dismissed on 05.11.2008. The same was obviously dismissed since a transferee *pendente lite* cannot make any objection or claim regarding execution of the decree as per Order 21 Rule 102 of the Code of Civil Procedure. Thus, categorically contending that the claimant who purchased the suit property fully knowing the dismissal of E.A.No.69 of 2003 filed by his vendor namely Murugesan, is obviously not a bonafide purchaser and he is fully aware that the property is already attached by the Court and hence, the claimant's petition is hit by Section 52 of the Transfer of Property Act and on that basis, pressed for dismissal of the Appeal.

15.Heard the learned counsel for the appellant, the learned counsel for the fourth respondent and careful anxiously perused the available materials on record.

16.The petition schedule property belong to one Palanisamy Pulavar who purchased the same under sale deed Ex.P1 on 25.11.1959. While so the decree holder one Balasubramaniam has filed O.S.No.93 of 2000, a suit for money as against one of the sons of the said Palanisamy Pulavar namely, Irulappan and his wife namely Esakkiammal. Along with the same, he also filed I.A.No.371 of 2000 seeking attachment before judgment and duly on 25.10.2000, the plaint



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schedule property/petition schedule property came to be attached by the learned Trial Court and later the said suit was also decreed in favor of the plaintiff Balasubramaniam/deGREE holder. Following which, the decree holder filed E.P.No.1 of 2002 before the learned Trial Court for sale of the petition schedule property. In the meanwhile, the elder son of Palanisamy Pulavar namely Murugesan filed E.A.No.69 of 2003 under Order 21 Rule 58 of the Code of Civil Procedure seeking to raise the attachment with respect to the petition schedule property on 17.03.2003, claiming that the aforesaid property has been bequeathed to him by his father under Ex.P6 registered Will. However, the same was dismissed for default on 20.09.2004. During the pendency of E.A.No. 69 of 2003, that is, before the dismissal of the same on 20.09.2004, the said Murugesan executed a sale deed on 11.11.2003 through his power of attorney holder namely Arumugapandian under Ex.P3 sale deed in favor of the claimant/Balamurugan. Claiming that he came to know of the dismissal of E.A.No.69 of 2003 filed by his vender by the learned Trial Court through the power of attorney holder of his vender, namely Arumugapandian on 22.12.2004, the claimant proceeded to file E.A.No.42 of 2005 before the learned Trial Court on 06.01.2005. On the grounds that the alleged Will under Ex.P6 has not been duly proved by the claimant, the learned Trial Court dismissed the said claim petition. Assailing the same, the claimant had



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preferred C.M.A.No.64 of 2006 on the file of the learned First Additional District Judge, at Tirunelveli and the same came to be dismissed on 20.11.2006 on the ground that the claimant's petition is hit by the principle of *lis pendens*, following which, the claimant is before this Court by way of the second appeal.

17.If the property attached is owned by a stranger and not by the judgment debtor, he can file a petition before the Execution Court under Order 21 Rule 58(1), or to file a suit under Order 21 Rule 58(5), or to challenge the sale under Order 21 Rule 90, or to offer obstruction to delivery under Order 21, Rule 97. A suit under Order 21 Rule 58(5), is maintainable only if the claim petition is dismissed for any of the two grounds indicated in the Proviso to Rule 58(1). Necessarily, a suit filed under Rule 58(5), deals with the right, title and interest of the owner of the property attached. This is an original action. In all cases not covered under Rule 58(5), the remedy of an owner of the property attached is to file a claim petition under Rule 58(1). Rule 58(2), unambiguously posits, that all questions relating to right, title and interest of the property attached arising between the parties to the proceedings, or their representatives shall be determined by the Court dealing with the claim or objection and not by a separate suit. Needless to mention that Rule 58(2) has created a forum in an Execution Court, as well as a procedure for dealing with the claim relating to



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right, title and interest over the property attached.

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18.In the instant case, during the pendency of E.P.No.1 of 2002, the vendor of the claimant, namely, Murugesan, who is the elder son of the original owner one Palanisamy Pulavar, filed an E.A.No.69 of 2003, under Order 21, Rule 58 of the Code of Civil Procedure, for raising the attachment with respect to the petition schedule property on 17.03.2003. However, the said Murugesan, without prosecuting the same to its logical end, proceeded to sell the petition schedule property through his power of attorney holder, Arumugapandian, in favor of the claimant vide sale deed, (Ex.P3), dated 11.11.2003. While so, on 20.09.2004, the aforesaid E.A filed by Murugesan came to be dismissed on 20.09.2004. Following which, the claimant, that is, the appellant herein, who had stepped into the shoes of his vendor, Murugesan, filed E.A.No. 42 of 2005, for the same cause of action, seeking to raise the attachment with respect to the petition schedule property. The learned First Appellate Court observing that though the action under Order 21 Rule 58(1), is in the nature of an original action, even though the forum prescribed to adjudicate the same is the Execution Court, the doctrine of *lis pendens* under Section 52 of the Transfer of Property Act, will have an invitation for his application and thus, Ex.P3 sale deed in favor of the claimant is hit by *lis pendens* and proceeded to conclude



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that E.A.No.42 of 2005 filed by the claimant is liable to be dismissed. At this

junction, the Court has to look into Order 9, Rule 9 of the Code of Civil

Procedure, 1908, and the same reads as follows:-

“Order 9 Rule 9 - Decree against plaintiff by default bars fresh suit.—(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. (2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”

19.From the close reading of the provision of Order 9 Rule 9 of the Code of Civil Procedure, 1908, it is made clear that if any suit is dismissed under Order 9 Rule 8, the concerned plaintiff is precluded from bringing a fresh suit on the same cause of action. For better understanding, it would be relevant to extract Order 21 Rule 58(1) and 58(2) of the Code of Civil Procedure, 1908, as under:-

“Order 21 Rule 58 - Adjudication of claims to or objections to attachment of, property.—(1) Where any claim is preferred to, or



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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 (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right



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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.”

20.A careful reading of Order 21 Rule 58(2) of the Code of Civil Procedure, 1908, makes it clear that all the questions including questions relating to right, title or interest in the property attached arising between the parties to a proceeding or their representatives under Order 21 Rule 58 shall be determined by the Execution Court dealing with the claim or objection and the same should not be done by a separate suit. Thus, the determination of the questions relating to right, title or interest in the property attached shall be adjudicated upon by the Execution Court in the manner of expediting a civil suit. Thus, the learned Appellate Court has rightly concluded that if the action under Order 21 Rule 58(1) is in the nature of an original action, even though the forum prescribed to adjudicate it, is the Execution Court, then the doctrine of *lis pendens* under Section 52 of the Transfer of Property Act will have to come into play and thus, Ex.P3 sale deed through which the claimant claims his title over the petition schedule property is obviously, hit by the principle of *lis pendens*.



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21. In the facts and circumstances of the instant case, I have no hesitation to observe that, since the vendor of the claimant has allowed E.A.No.69 of 2003, which was filed for raising the attachment with respect to the petition schedule property to be dismissed for default on 20.09.2004, the claimant is precluded from bringing a fresh application on the same cause of action under Order 21 Rule 58 of the Code of Civil Procedure, 1908. Thus, I have no hesitation to hold that the bar created under Order 9 Rule 9 of the Code of Civil Procedure, 1908, would also be applicable to the transferee of the earlier claimant who instituted an earlier claim petition in the same Execution Proceedings and allowed the same to be dismissed for default.

22. Hence, I have no hesitation to conclude that the bar created under Order 9 Rule 9 of the Code of Civil Procedure, 1908, is also applicable to a transferee of the claim petitioner who instituted an earlier claim petition in the same execution proceeding, which has been dismissed for default. Thus, it is needless to state that the dismissal of E.A.No.69 of 2003 filed by the vendor of the petitioner which was dismissed for default on 20.09.2004 would automatically bar the claim petitioner from making an independent claim afresh in the same, in the said Execution Proceeding for the same cause of action.



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23.It is pertinent to mention here that later the claim petitioner has further filed yet another E.A. in E.A.No.138 of 2008 under Order 21 Rule 97 of the Code of Civil Procedure,1908, and the same was also dismissed by the learned Trial Court on 05.11.2008. In the meanwhile, yet another E.A. in E.A.No.108 of 2008 was filed by the auction purchaser for taking delivery and the same was also allowed by the learned Trial Court on 05.11.2008.

24.Accordingly, nothing survives in the instant case for further adjudication. Therefore, the application filed by the claimant/third party under Order 21 Rule 58 of Civil Procedure Code is not maintainable. In the result, the Civil Miscellaneous Second Appeal stands dismissed. There shall be no order as to costs.

19.06.2024

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

- 1.The I Additional District Judge, Tirunelveli.
- 2.The Sub Judge, Ambasamudram.
- 3.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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L.VICTORIA GOWRI, J.

Mrn

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