IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on	08.02.2024
Orders Pronounced on	08.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.DHANABAL

C.M.A.(MD) No.550 of 2014
and
M.P.(MD) No. 1 of 2014

Marimuthu Nadar Karuppatti Kadai,
Rep. by its Properitor,
M.Kumaran,
No. 174, Sagunipalayam Road,
Ellis Nagar,
Dharapuram Town & Taluk,
Erode District. ...Appellant

Vs

1. G.S.Usha

2. Gopalakrishnan

3. Sivakumar ....Respondents

Prayer: Civil Miscellaneous Appeal filed under Order 43 Rule (1) r/w 96 of Civil Procedure Code, to allow this Civil Miscellaneous Appeal by set aside the Fair and Decreetal order dated 01.02.2014 passed in E.A.No. 252 of 2009 in E.P.No. 17 of 2009 in O.S.No. 31 of 2007 on the file of the District Court, Nagercoil.

For Appellant	: Mr.R.Thangapandian
For R1	: Ms. Jessi Jeeva Priya
For R2 & R3	: Mr.P.Prabhakaran

JUDGMENT

This Civil Miscellaneous Appeal has been preferred as against the order passed in E.A.No. 252 of 2009 in E.P.No. 17 of 2009 in O.S.No. 31 of 2007 on the file of the District Court, Nagercoil, wherein the first respondent herein has filed the petition before the Executing Court in E.A.No. 252 of 2009 to decide the claim and right of the petitioner over the property under Order 21 Rule 58 and Section 151 of Civil Procedure Code. The Executing Court has allowed the petition and attachment order was raised in respect of the petition mentioned property. Against the said order, the present CMA has been preferred by the appellant/first respondent/Plaintiff.

2. The brief facts of the petition filed before the Executing court are as follows:-

The first respondent had filed a suit as against the second and third respondents in O.S.No.31 of 2007 on the file of the Additional District Court (Fast Track Court), Dharapuram for recovery of money. The petitioner is not a party to the said proceedings. The second respondent herein has settled the property in favour of the petitioner on 22.12.2004 and the petitioner had no knowledge of the business transactions between the first and second respondents. The first respondent knowing very well that the property belongs to the petitioner through settlement deed had attached the property through Court order. On the date of attachment, the property was not in the name of the second respondent and the same was in the name of the petitioner. Therefore the attachment order is not binding upon the petitioner. Therefore she filed this claim petition to raise the attachment.

3. The brief averments of the counter filed by the first respondent/decree holder are as follows.

The petition is not maintainable either in law or on facts and the petitioner is doing palm jaggery business. The second respondent is the father of the third respondent. The second and third respondents had business transactions with the first respondent from 06.04.2001 to 20.08.2004. Due to that business transaction, the second and the third respondents are liable to pay sum of Rs.8,51,869/- to the first respondent/plaintiff. The first respondent has filed a suit in O.S.No. 31 of 2007 on the file of the Additional District Court (Fast Track Court), Dharapuram and also filed the application in I.A.No.24 of 2007 for attachment before judgment and the same was also allowed and the suit was also decreed in favour of the first respondent/plaintiff. The attachment order was passed on 27.11.2007 for a sum of Rs.11,56,247/-. The schedule property originally belongs to the second respondent/first defendant and in order to defeat the valuable rights of the first respondent/plaintiff, the second respondent/first defendant executed the nominal deed in favour of the petitioner only in order to evade from the liability to the decree which is to be passed in favour of the first respondent/plaintiff. Since the property was given to the petitioner as gift, she is liable to pay the debts of the donor of the second respondent/first defendant under Section 128 of Transfer of Property Act, 1882. The petitioner colluded with the second and third respondents and filed this petition to delay the proceedings. Therefore the petition is liable to be dismissed.

4. The brief averments of the counter filed by the second and third respondents are as follows:-

The petition is not maintainable either in law or on facts. The decree is not executable. No notice was served to the respondents in the Execution Petition. The respondents are taking steps to prefer an appeal. Therefore the Execution Petition is liable to be dismissed and the present claim petition is liable to be allowed.

5. Before the Executing Court on behalf of the petitioner she was examined as P.W.1 and marked Ex.P1 to P8 and on the side of the respondents, the first

respondent was examined as R.W.1 and marked Ex.R1 to R4. No oral or documentary evidence adduced on the side of second and third respondents. After considering both sides evidences, the Executing Court has allowed the petition. Aggrieved over the said order, the first respondent/plaintiff/decree holder filed this Civil Miscellaneous Appeal on the following grounds.:-

(i) The fair and decretal order of the Executing Court is against law and weight of evidence.

(ii) The lower Court failed to see that the settlement deed said to have been executed by the second respondent in favour of the first respondent is fraudulent transaction so as to defeat the decree to be passed in favour of the appellant.

(iii) The lower Court failed to see that the debt of the second respondent is anterior in time and the second respondent with a view to defeat the debt has executed fraudulent settlement deed (Ex.P2)

(iv) The executing Court failed to see that the property was attached even in the year 2007 and the first respondent remained as a silent spectator for quiet considerable time which dis-entitles her to make a claim under Order 21 Rule 58 of C.P.C.

(v) The executing Court failed to see that the judgment debtor/second respondent has not whispered about the alleged settlement deed in favour of the first respondent during proceedings of the main civil suit.

(vi) The executing Court failed to see that "ENTIRE" properties of the second respondent were gifted to the first respondent/petitioner under Ex.P2 that being so the donee/first respondent herein is personally liable for all the debts due by the donor/second respondent at the time of gift, as stipulated under Section 125 of the Transfer of Property Act, 1882.

(vii) The executing Court failed to see that the second respondent herein executed a fraudulent settlement deed in favour of the first respondent subsequent to the criminal complaint of the appellant and the same will expose the malafide intention of the second respondent herein.

6. The learned counsel appearing for the appellant would contended that the appellant has filed the suit in O.S.No. 31 of 2007 on the file of the Additional District Court (Fast Track Court) Dharapuram as against the second and third respondents herein for relief of recovery of money and at the time, the appellant

has filed petition for attachment before judgment in I.A.No. 24 of 2007 and the same was allowed. The suit property was attached on 27.11.2007 and thereafter suit was also decreed and then the appellant has filed Execution Petition and when the matter was posted for sale of the property, the present petition has filed only to delay the proceedings.

6.1. The claim petition was filed alleging that the property was settled in favour of the first respondent/petitioner/claimant herein through settlement deed dated 22.12.2004. The transactions are pertaining from the year 06.04.2001 to 20.08.2004. Already the appellant had lodged a complaint before the police station on 29.11.2004 and thereafter only the second respondent had executed settlement deed in favour of the first respondent/petitioner/claimant herein. Therefore, the settlement deed was executed only to defeat the claim of the appellant in the said suit. The first respondent/petitioner/claimant is liable to pay the debts of the second respondent/first defendant/first Judgment Debtor. Since the entire property of the second respondent/first defendant/first Judgment Debtor has been gifted to the first respondent/petitioner/claimant, she is liable to pay the debts of the second respondent/judgment debtor under Section 128 of Transfer of

Property Act, 1882. The Executing Court has not considered the above aspects and misconstrued that under Section 128 of Transfer of Property Act, the liability arises only when the donor dies or becomes bankrupt or when the transfer has been made with intent to defraud the creditors. In fact those conditions are applicable only to English law and not for the Indian Law. Therefore the order passed by the Executing Court is liable to be set aside by allowing this appeal.

7. The learned counsel appearing for the first respondent would contended that the first respondent had no knowledge about the transaction between the appellant and the second and third respondents. The petition mentioned property was settled in favour of the first respondent/petitioner on 22.12.2004 and from the date of settlement deed itself, the first respondent/petitioner is in possession and enjoyment of the suit property and the revenue records was also transferred in the name of first respondent/petitioner. The present suit is filed after three years from the date of execution of settlement deed. Therefore, there is no any intention to cheat or delay or to defraud the claim of the appellant. Since the property was settled in favour of the first respondent/petitioner before the suit. The property of the first respondent/petitioner cannot be attached. Therefore the attachment order

passed by the Trial court in I.A.No. 24 of 2007 in O.S.No. 31 of 2007 is not binding upon the petitioner's right. Therefore the Executing Court after considering the evidence adduced on either side correctly allowed the petition and the present appeal is liable to be dismissed.

8. Heard both sides and perused the materials available on records.

9. Points for determination in this appeal are as follows:-

1. Whether the property was transferred with malafide intention and the same is fraudulent transfer?
2. Whether the property settled in favour of the first respondent is liable for the debts of the second respondent as she is a universal donee?
3. Whether the fair and decretal order passed by the Executing Court is sustainable in law and on facts?
4. Whether the appeal is to be allowed are not?

10. For Point Nos. 1 and 2:- The first respondent has filed the claim petition before the Executing Court under Section 21, Rule 58 and Section 151 of CPC to decide the claim of the petitioner and to raise the attachment passed against the petition mentioned property. According to the first respondent, the property was settled in her favour on 22.12.2004 and the suit was filed in the year 2007 and the attachment order was passed on 27.11.2007 therefore on the date of order of attachment of property was in the name of the first respondent. Hence the order of attachment is liable to be set aside. On the date of attachment, the second respondent was not an owner of the property and the first respondent/petitioner was the owner of the property. Therefore, the attachment has to be raised.

11. According to the appellant/first respondent/plaintiff, there was business transactions between the appellant and the second and third respondents. There was a due pending between the appellant and the second and the third respondents. Thereby, the appellant had given complaint before the police station

on 29.11.2004. Thereafter to cheat the appellant, the second respondent executed the settlement deed in favour of the first respondent/petitioner, therefore, the transfer is a fraudulent transfer. Further the entire property of the second respondent was gifted to the first respondent and thereby she is liable to pay the debts of the second respondent/first defendant as Universal donee. Therefore the property is liable for the debt of the second respondent/first defendant.

12. This Court has perused the records, it is admitted fact that the first respondent/petitioner/claimant is none other than the daughter of the second respondent/first defendant/first Judgment debtor. It is admitted fact that the petition mentioned property was settled to the first respondent through the second respondent/first defendant by way of settlement deed dated 22.12.2004 and there is no dispute that the appellant/first respondent/plaintiff has got decree in O.S.No. 31 of 2007 and he has filed execution petition to sale the petition mentioned property after attaching the property. The first respondent/petitioner/claimant has not filed any claim petition immediately after the attachment and the present

petition was filed after two years from the date of decree that also after the execution petition was filed for sale of the property. According to the appellant/first respondent/plaintiff, he gave police complaint prior to the date of Settlement deed in favour of the first respondent/petitioner/claimant. But no any documents filed to show the further action taken based on the said complaint. Had the complaint was given as alleged by the appellant, he ought to have taken further steps to register FIR, but no any steps were taken. Further after the complaint the appellant has not filed the suit immediately and the suit is filed after two years. Therefore, there is no evidence that the property was settled to defeat the claim of the appellant and no evidence to attract the provisions of Section 53 of Transfer of Property Act, 1882. Though the appellant has failed to prove that complaint was given prior to the execution of settlement deed and not filed suit immediately after alleged the complaint, it is admitted fact that the first respondent/petitioner /claimant has obtained settlement deed and she entitled for entire property of the second respondent/first defendant was gifted to the first respondent /petitioner/claimant. Hence she is liable to pay the debts of the second respondent/first defendant through the gifted properties under Section 128 of Transfer of Property Act, 1882. At this juncture it is relevant to extract the Section

128 of Transfer of Property Act, 1882:-

> *“**128. Universal donee**.--Subject to the provisions of section 127, where a gift consists of the donor's whole property, the done is personally liable for all the debts due by (and Liabilities of) the donor at the time of the gift to the extent of the property comprised therein.”*

As per the Section 128 of Transfer of Property Act, the Universal donee holds the entire property of the donor and he has bound to discharge donors liability to the extent of the property comprised therein.

13. In the case on hand also, there is no dispute that the property was settled in favour of the first respondent/petitioner/claimant. The second respondent/first defendant has to pay the decree amount to the appellant/plaintiff and thereby the first respondent/petitioner/claimant is liable to pay the amount to the extent of the property comprised in the settlement.

14. Accordingly to the appellant, the property was transferred only to cheat the claim of the appellant and thereby it is the principle of fraudulent transfer in order to prove the same, the appellant has not produced any documents and he only relied upon the complaint given on 29.11.2004, but the appellant failed to prove that complaint was given on that particular date and there is no evidence whether any FIR registered or not? Whether any further action has been initiated or not? Further even assuming that the appellant had preferred the complaint as against the second respondent/first defendant, he has not filed the suit immediately and suit was filed only in the year 2007. Therefore, the appellant failed to prove that the property was transferred with a malafide intention and the gift deed hit by fraudulent transfer. However, the first respondent/petitioner/claimant being the Universal donee is liable to settle the debts of the donor, the second respondent/first defendant to the extent of the property settled in her favour.

15. The learned Counsel for the appellant relied on the judgment of the Hon'ble Supreme Court in the case of ***C. Abdul Shukoor Saheb Vs. Arji Papa***

Rao and others reported in ***AIR 1963 SC 1150*** and also relied on the judgment in the case of ***Shanmugam and other*** *vs.* ***Syndicate Bank and others*** reported in ***AIR 1999 Madras 74, o***n careful perusal of the said judgments, it is clear that if the property is transferred in order to defeat the creditors its hit by fraudulent transfer under Section 53 of Transfer of Property Act, 1882. But in the case on hand there is no evidence that in order to defeat the creditors the transfer was made. However, the Universal donee as contemplated under Section 128 of the Transfer of Property Act, 1882 is liable to pay the liabilities of the donor to the extent of the properties. Thus, the points 1 and 2 are answered.

16. **For Points No. 3 and 4:-** The first respondent herein has filed the claim petition before the Execution Court in E.A.No. 252 of 2009 alleging that she has obtained property through settlement deed dated 22.12.2004 but the attachment was ordered on 27.11.2007. On the date of attachment, the second respondent/ first defendant was not a owner of the property and the first respondent/petitioner is the owner of the property. This Court already in the previous points decided that

the first respondent/petitioner is liable to pay the debts to the extent of the property comprised in the settlement deed. But the Trial Court in the Order held that the property was settled in the year 2004 and the suit was filed in the year 2007, the petitioner has been in the possession and enjoyment of the property from the year 2004 and there is no evidence to show that the property was transferred with a malafide intention to defeat the claim of the appellant and further held that the gifted properties are liable only when the gifted was transferred with intention to defraud the creditors or when the donors died gifted the properties are liable. The above said observation of the Executing Court are erroneous and the Court below failed to consider that the petitioner is universal donee and as per Section 128 of Transfer of Property Act, 1882, the Universal Donee is liable to discharge the liability of the donor to the extent of the property comprised in the settlement deed. Therefore the order passed by the Executing Court is erroneous and unsustainable. In view of the above said discussion, this Court is of the opinion that the fair and decreetal order passed by the Court below is liable to be set aside by allowing this Civil Miscellaneous Appeal. Thus, the points 3 and 4 are answered.

17. In the result, this Civil Miscellaneous Appeal(MD) is allowed. The Fair and Decreetal order dated 01.02.2014 passed by the Executing Court in E.A.No. 252 of 2009 in E.P.No. 17 of 2009 in O.S.No. 31 of 2007 are set aside and the petition in E.A.No. 252 of 2009 is dismissed. The miscellaneous petitions, if any, shall stand closed. No costs.

08.04.2024

Index	:	Yes/No
Internet	:	Yes/No
Citation	:	Yes/No

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P.DHANABAL,J

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