BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **22.07.2024**

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THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1217 of 2017
and
C.M.P(MD)No.11942 of 2017

K.Gunasekaran ... Appellant/Third Party/
Court Auction Purchaser/
Third Party

Vs.

Sri Jembu Krishnamoorthy Kumaresh
Represented by his General Power of Attorney
J.K.Urmila. ... Respondent/Petitioner/
Third Party/Third Party

2.A.S.Jeyaraman ... Respondent/1st Respondent/
Petitioner/Plaintiff/DH

3.G.Rukmani ... Respondent/2nd Respondent/
Respondent/Defendant/JD

Prayer: Civil Miscellaneous Appeal is filed under Order Order 21 Rule 58 (4) of Code of Civil Procedure, to set aside the fair and decretal order, dated 27.01.2016 passed in E.A.No.22 of 2010 in E.P.No.3 of 2009 in O.S.No.113 of 2007 on the file of I Additional District Judge, Madurai.

For Appellant : Mr.R.V.Rajkumar

For Respondents : No Appearance

JUDGMENT

A third party Court auction purchaser in a money suit is the appellant herein, challenging the allowing of a claim petition filed under Order 21 Rule 58 of Code of Civil Procedure.

2. The 2nd respondent herein as plaintiff had filed the above said suit for recovery of money. The suit was decreed on 31.10.2007. He filed E.P.No.3 of 2009 to bring the properties for sale in order to realize the money decree. The property was sold on 26.04.2010.

3. Before confirmation of sale, a third party who is arrayed as the 1st respondent in the appeal had filed E.A.No.22 of 2010 under Order 21 Rule 58 of Code of Civil Procedure making a claim over the property. A perusal of the claim petition indicates that the claim petitioner had purchased the property on 17.09.2007 from the judgment debtor. However, the property was attached in execution proceedings only on 29.07.2008 and it was sold on Court auction on 26.04.2010. Therefore,

on the date of attachment and on the date of sale of the property, the judgment debtor did not have any title over the property. Hence, he had filed the claim petition to raise the order of attachment.

4. Admittedly, the Court auction purchaser was not impleaded as one of the respondents in the claim petition eventhough the sale has already taken place. The decree holder has filed a counter contending that the summons in the main suit was sent to the defendants on 10.08.2007 and it was affixed on 04.08.2007. The private notice addressed to the defendant was returned as "refused" on 03.09.2007. Thereafter, paper publication was effected in the application for attachment before judgment. Therefore, the judgment debtor was very well aware of the pendency of the suit as well as the pendency of an application for attachment before judgment. Knowing fully well, he had fraudulently transferred the property in favour of the claim petitioner. Hence, he had prayed for dismissing the application.

5. The Executing Court after considering the submissions on either side, has arrived at a finding that the suit being money suit , Section 52 of the Transfer of Property Act will not be applicable. The Executing

Court further found that on the date when the property was attached, it had already been sold by the judgment debtor in favour of the claim petitioner. Therefore, there is no bar for the defendant to execute the sale deed in respect of a suit property. Based upon the above said findings, the claim petition was allowed. Challenging the same, the present appeal has been filed by the Court auction purchaser.

6. The learned counsel appearing for the Court auction purchaser / appellant had contended that when the defendant was aware of the pendency of the suit and he has refused to receive notice in the attachment before judgment application, the sale effected by them should only be consumed as a fradulent sale to defraud the creditor. In such circumstances, the Executing Court ought not to have allowed the claim petition based upon the fact that the sale has been effected much prior to the date of order of attachment. Hence, he prayed for allowing the appeal.

7. Even though the claim petitioner has been served, he has not chosen to appear either in person or through counsel.

8. I have carefully considered the submissions made on the side of teh appellant and perused the material records.

9. Along with the suit for recovery of money, the plaintiff had filed I.A.No.316 of 2007 for effecting attachment before judgment. Notice was ordered in the said application on 01.07.2007. The suit summons could not be served in person and they were affixed on 04.09.2007. The said affixture has been marked as Exhibit R.4. The private notice sent by the plaintiff's counsel in the attachment before application was refused by the defendant on 03.09.2007. The said refusal cover has been marked as Exhibit R.5. Two weeks thereafter, the judgment debtor has sold the property in favour of the claim petitioner on 17.09.2007. The suit summons have been served upon the defendant through paper publication on 27.09.2007 and thereafter, *ex parte* decree has been passed on 31.10.2007. The timeline mentioned above will clearly indicate that the dedendant was very well aware of the pendency of the money suit as well as the application for attachment before judgment. After refusing to receive the notice in I.A.No.316 of 2007, the judgment debtor has chosen to alienate the property in favour of the claim petitioner herein. In such circumstances, the Court has to consider

whether it is a fraudulent transfer effected by the judgment debtor inorder to defraud the creditor as contemplated under Section 53 of Transfer of Property Act.

10. The learned counsel appearing for the appellant has brought to the notice of the Court, the judgment reported in ***2010 1 MLJ 556 (V.P.S.Viswanathan Vs. Sri Raja Yarns Traders)*** to impress upon the Court that the creditor need not file a separate suit to decide whether the transfer by the judgment debtor is a fraudulent transaction or not. In the execution proceedings itself, it could be decided whether the transfer pending litigation is a fraudulent transfer or not. The said issue has not been properly appreciated by the trial Court.

11. It could be seen from the records that the application under Order 21 Rule 58 of Code of Civil Procedure has been filed after Court auction sale. The proviso to Order 21 Rule 58 (i) of Code of Civil Procedure prohibits entertainment of any claim or objection petition to raise the order of attachment, if the attached property has already been sold. In the present case, the Court has chosen to entertain an application under Order 21 Rule 58 of Code of Civil Procedure without there being a

challenge to the same or an application under Order 21 Rule 97 of Code of Civil Procedure.

12. In view of the abvoe said deliberations, the order of the Executing Court in E.A.No.22 of 2010 is hereby set aside and the matter is remitted back to the file of the learned I Additional District Court, Madurai to consider whether the issue falls within Section 53 of the Transfer of Property Act and adjudicate upon the said issue after hearing both the parties.

13. With the said observations, the Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

22.07.2024

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

1.The I Additional District Judge, Madurai.

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court, Madurai.

R.VIJAYAKUMAR,J.

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Judgment made in
C.M.A(MD)No.1217 of 2017

22.07.2024