

(2011) 12 MAD CK 0144

In the Madras High Court

Case No : CRP. (PD) . No. 526 of 2010 and M.P. No. 1 of 2010

A. Murugan

APPELLANT

Vs

J. Rajendra Prasad and P. Rajamalar

RESPONDENT

Date of Decision : 10-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 10, Order 38 Rule 5, Order 38 Rule 8

Citation : (2012) 2 CTC 235

Hon'ble Judges : V. Periya Karupiah, J

Bench : Single Bench

Advocate : V. Raghavachari, for the Appellant; K. Thangavelu for Respondent-1 and Mr. N.A. Nissar Ahmed for Respondent-2, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice V. Periya Karupiah

1. This Revision has been filed by the petitioner, who was a third party before the lower Court applied for removing the attachment ordered before judgment by the said Court in I.A.No.1192 of 2008, against the dismissal order passed in the application in I.A.No.251 of 2009 filed for that purpose.

2. The petitioner is a third party and the first respondent is the petitioner / plaintiff and the second respondent is the respondent / defendant.

3. Heard Mr. Raghavachari, learned counsel appearing for the petitioner and Mr. K. Thangavelu, learned counsel for the first respondent and Mr. N.A. Nissar Ahmed, learned counsel for the second respondent.

4. The learned counsel for the petitioner herein would submit in his argument that the petitioner, as third party, had filed an application before the lower Court to raise the attachment made in the property belonging to him under Order 38 Rule 10 CPC. He would further submit that the property was purchased by him on 11.09.2008 and he became the owner thereof, but the order of attachment

was passed on 05.01.2009, which is subsequent to the date of his purchase. He would further submit that the lower Court was very much confused over the right of parties over the said property without admitting any evidence of both oral and documentary. He would further submit that the purchase made by the petitioner was bonafide and supported by consideration. He would also submit that the attachment before judgment passed by the Courts under Order 38 Rule 5 CPC shall not affect any right existing before the said attachment order and the persons who are not parties to the suit would not be bound by such attachment. He would also submit that the attachment order shall not override the contractual obligation arising from an antecedent agreement for the sale of the property. He would further submit that the petitioner has got a better title and therefore, the attachment against his interest should have been raised. He would further submit that the procedure as contemplated under Order 38 Rule 10 CPC has not been followed by the lower Court by permitting the petitioner to adduce oral evidence and to hear him like that of the suit and on that ground itself the order passed by the lower court is vitiated. He would further submit that the order passed by the lower court is, therefore, liable to be set aside and the Revision shall be ordered, accordingly.

5. The learned counsel for the first respondent would submit in his argument that the petitioner had no iota of interest in the suit property, since he purchased the property from the Power Agent of the second respondent / defendant after the power was cancelled by the second respondent / defendant. Therefore, there cannot be any pre-existing right before the order of attachment. He would further submit that the power given by the second respondent / defendant was cancelled on 09.07.2008, whereas the sale deed has been executed on 11.09.2008, long after the said cancellation. Therefore, there cannot be any valid title passed from the second respondent / defendant to the petitioner. He would further submit that the attachment order passed on 05.01.2009 was made absolute on 16.02.2009, which would be valid and bind upon the petitioner also. Therefore, he would request the Court to dismiss the petition.

6. The learned counsel for the second respondent / defendant would submit in his argument that the second respondent / defendant did not participate in the suit and therefore, an *exparte* decree was passed against him and Execution Proceeding has also been filed for the execution of the same, however, he is taking steps to set aside the *exparte* decree and also to agitate his right in the attachment before judgment petition. He would further submit that the alleged purchase by the petitioner from the power agent of the second respondent / defendant cannot be valid, since the defendant had cancelled the power on 09.07.2008 and on which date, the power agent had entered into the sale agreement with some other Mr. Balasubramanian in respect of the suit property, which was also not valid in law. The said cancellation of the power deed was very much known to the power agent Mr. Subash Chandra Bose, since he was also present at the Sub-Registrar Office on that day, while the cancellation of power was done. He would, therefore, request the Court that the petitioner has no right

in the property prior to the attachment ordered by this Court and therefore, there is no necessity for passing any order as sought for by the petitioner. However, he has to exercise his right over the said property in the application to raise the attachment and therefore, suitable orders may be passed for rendering a fair opportunity to the second respondent / defendant.

7. I have given anxious consideration to the arguments advanced on either side.

8. The suit was originally filed by the first respondent / plaintiff against the second respondent / defendant and at that time, an attachment before judgment application was filed by the first respondent against the properties of the second respondent and the lower Court had ordered attachment before judgment in security of the suit claim and the said order was made absolute when the suit was decreed *ex parte* by the lower Court. The petitioner has come forward with an application, to raise the attachment, in I.A.No.251 of 2009 by claiming that the property belongs to him by virtue of the purchase made on 11.09.2008 from the power agent of the second respondent / defendant. The execution of Power of Attorney by the second respondent / defendant in favour of Mr. Subash Chandra Bose was admitted by the second respondent / defendant. However, it was contended by the second respondent / defendant supported by the first respondent / plaintiff that the said power granted to the said Mr. Subash Chandra Bose was cancelled on 09.07.2008. Their contention, therefore, would be that the sale deed executed by the Power Agent, namely, Mr. Subash Chandra Bose in favour of the petitioner on 11.09.2008 in respect of the suit property was not a valid document. However, the lower Court has come to a conclusion that the said document, namely, sale deed dated 11.09.2008 executed by the Power Agent of second respondent / defendant in favour of the petitioner is not a valid document and therefore, there would be no right to flow through the said document.

9. The main contention of the petitioner would be that Order 38 Rule 10 CPC contemplates a full-fledged trial like opportunity should be given to the parties so as to decide the title of the said property for the purpose of vacating or confirming the order of attachment before judgment passed by this Court. However, the lower Court did not adopt such procedure, but had admitted only certain documents for the purpose of its discussion. It is also an admitted fact that the second respondent / defendant also remained *ex parte* in the said application. Therefore, the enquiry conducted by the lower Court to find out the title of the suit property for the purpose of confirming or vacating the attachment order passed by this Court was not sufficient and was not in consonance with the provisions of Order 38 Rule 8 CPC. Order 38 Rule 8 CPC would run as follows:

8. 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 hereinbefore provided for the adjudication of claims to property attached in execution of a decree for the payment of money.

10. On a cursory look at the provisions of Order 38 Rule 10 CPC, I could see that the procedure to be adopted would be similar to that of raising attachment in Execution Proceedings. As far as the raising of attachment ordered in the Execution Proceedings are concerned, it should be similar to that of a suit and all the parties should be given opportunity by the Court so as to decide the title of the property. On a perusal of the order of the lower Court, I could see that no oral evidence was adduced on either side and the relevant documents were not produced by proving them through oral evidence. Therefore, it has become necessary for this Court to give an opportunity to all the parties to participate in the application filed by the petitioner before the lower Court in I.A.No.251 of 2009 on the file of the Additional District Judge, Fast Track Court No.II, Salem. In order to enable the parties to state their case, it has become necessary for this Court to set aside the order passed by the lower Court and to remit back the same to the said Court for fresh disposal, as indicated above, after examining the parties on both sides in oral evidence and after producing relevant documents through such oral evidence.

11. For the foregoing discussions, I am of the considered view to set aside the order passed by the lower Court and the matter is remanded back to the lower Court for fresh disposal in accordance with law and the procedure as contemplated under Order 38 Rule 8 CPC, after giving opportunities to both parties to adduce both oral and documentary evidence on their side and to pass orders on merits.

12. The Civil Revision Petition is accordingly allowed. The parties are directed to appear before the lower Court on 23.01.2012. No costs. Connected Miscellaneous Petition is closed.