

(2013) 07 MAD CK 0328

In the Madras High Court

Case No : C.R.P. (NPD) No. 4168 of 2009 and M.P. No. 1 of 2009

C. Sengottaiyan

APPELLANT

Vs

K. Saravanan

RESPONDENT

Date of Decision : 31-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54, Order 21 Rule 64, Order 21 Rule 66, Order 38 Rule 5, Order 38 Rule 6
Transfer of Property Act, 1882 — Section 128

Citation : (2013) 6 CTC 456 : (2013) 4 LW 754 : (2014) 1 MLJ 527

Hon'ble Judges : K. Ravichandrabaabu, J

Bench : Single Bench

Advocate : N. Manokaran, for the Appellant; T. Murugamanickam, for the Respondent

Final Decision : Allowed

Judgement

K. Ravichandrabaabu, J.—The petitioner is the plaintiff in O.S. No. 190/2000 on the file of the Sub court, Mettur. He filed the said suit for recovery of a sum of Rs. 1,17,575/- against the respondent herein based on a promissory note. Pending disposal of the suit, the plaintiff filed I.A. No. 386/2000 under Order 38 Rule 5 C.P.C., and sought for attachment before the judgment in respect of a property belongs to the defendant. On notice, in the said application, the defendant appeared before the court and furnished security for production of the property as and when required by the court. The trial court by accepting the security offered by the defendant and recording the same, rejected the objections raised by the plaintiff. Thereafter, the suit came to be decreed, on merits, on 25.02.2003. Thus, a decree was granted directing the defendant to pay Rs. 1,17,575/- with interest. Consequent upon such decree, the plaintiff filed execution petition in E.P. No. 69/2009 under Order 21, Rule 54, 64 and 66 C.P.C. for recovery of the said decretal amount. The defendant as the respondent in the E.P. though originally filed counter on 12.09.2006 and 25.01.2007 by contending that it is an excessive execution, however by filing an affidavit counter affidavit

on 04.06.2008 and informed the court that the property mentioned in the execution petition has been settled in the name of his parents through documents Nos. 92 and 93/2007 and therefore, he has no transferable right in that property. The Execution Court accepting the said contention and also by finding that the said property was not attached by the court earlier during the pendency of the suit, dismissed the execution petition. Aggrieved against the said order, the plaintiff filed the above civil revision petition. Mr. N. Manokaran, learned counsel appearing for the petitioner submitted that the respondent/defendant is not entitled to execute a settlement deed during the pendency of the execution proceedings in total violation of the security given by him in I.A. No. 386 of 2000 filed under Order 38 Rule 5 C.P.C. during the pendency of the suit. Thus, it is contended that the settlement deeds executed in violation of the security given are not valid in the eye of law and consequently, the Executing Court should have proceeded against the said property for realisation of the decretal amount. It is further submitted by him that u/s 145(2) of C.P.C., the court can enforce the liability of a third party surety by sale of such property to the extent of the security. He further submitted that u/s 128 of the Transfer of Property Act, the parents being universal donee are liable to the debts of their son viz., the defendant. He also pointed out that the security given by the defendant is exactly in the same format as contemplated under Form No. 5 executable under Order 38 Rule 5 C.P.C. Thus, what was given by the defendant, is not a mere undertaking but it is the security to the Court. He also submitted that such security given by the defendant does not require registration.

2. In support of his submission, the learned counsel appearing for the petitioner relied on the following decisions:

- (i) Western Press Pvt. Ltd., Mumbai Vs. The Custodian and Others,
- (ii) Dayanandan and Another Vs. Venugopal Naidu,
- (iii) Shanmugam and 2 others Vs. M/s. Syndicate Bank and 9 others,
- (iv) Howrah Insurance Co. Ltd. Vs. Sochindra Mohan Das Gupta,

3. Per contra, Mr. T. Murugamanickam, learned counsel appearing for the respondent submitted that what was given by the defendant in response to the notice in the application under Order 38 Rule 5 C.P.C. is only an undertaking not to alienate and when such undertaking had not culminated into an order of attachment by the Court, there was no bar for transferring the property by the defendant in favour of the third parties. He further submitted that offering of security should be followed by creating a charge over the property by ordering attachment by the Court. If no such attachment is made, then such offer will not prevent the defendant from alienating the property.

4. In support of his submission, learned counsel for the respondent relied on the following decisions:

- (i) 1991 (1) L.W. 23 (SC), K. Muthuswami Gounder v. N. Palaniappa Gounder;

(ii) 1999 (1) L.W. 38, M.V. Rajasekaran v. Balagangadharan and another;

5. Heard the learned counsel appearing for the counsel on either side and perused the material documents placed before this court.

6. Going by the pleadings of the respective parties and their contentions as well as the relevant materials placed before this court, following questions emerge for consideration in this civil revision petition:

(i) Whether the security given by the defendant on 15.12.2000 in I.A. No. 386/2000 filed under Order 38 Rule 5 C.P.C., is simply an undertaking not to alienate the property or it is a security given in accordance with Order 38 Rule 5 C.P.C.?

(ii) If the security given by the defendant is not a simple undertaking not to alienate the subject matter of the property, whether the defendant was entitled to alienate the same and consequently, whether the order made in the E.P. in dismissing the same is sustainable?

7. The petitioner as the plaintiff filed the suit for recovery of money. Pending suit, he filed an application under Order 38 Rule 5 C.P.C., praying for an order of attachment of the defendants property before judgment. On notice in the said application, the defendant came forward to execute a security for production of the property through document dated 15.12.2000. The recitals of the said security given are extracted hereunder:

SECURITY GIVEN BY THE RESPONDENT/DEFENDANT FOR PRODUCTION OF PROPERTY.

Whereas at the instance the petitioner/plaintiff in the above suit the respondent/defendant has been directed by the Honourable Court to furnish security in the sum of Rs. 1,00,000/- (Rupees One Lakh only) to produce and place at the disposal of the court the property specified in the schedule here to annexed.

Therefore, K. Saravanan, aged about 32 years, Hindu residing at Kadalur Main Road, Manivizundhan Village, and Post, Attur Taluk, Salem District have voluntarily become surety and to hereby bind myself. My heirs and executors to the said court that I shall produce and place at the disposal of court. When required the property specified in the said schedule on the value of the same and such property thereof as may be sufficient to satisfy the decree and in default of my doing so, I bind myself my heirs and executors to pay the said in court at its order the said sum of Rs. 1,00,000/- (Rupees One lakh only) on such sum not exceeding the said sum as the said court may adjust.

Mettur. 15.12.2000 Sd/not known. Counsel for the respondent.

8. Before proceeding further, if we peruse Order 38 Rule 5 C.P.C., it indicates that the Court may direct the defendant either to furnish the security in the sum as may be specified in the order he is made to produce and place at the disposal of the court, when required, the property or the value of the same to satisfy the

decree, if it is satisfied that the defendant with an intent to obstruct or delay the execution of any decree is about disposal of the whole or any part of his property, etc. For full clarity of the said provision, the same is extracted here under:

Order 38, Rule 5 C.P.C.

5. Where defendant may be called upon to furnish security for production of property:--

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified,

[(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.]

9. A perusal of the said provision makes it clear that if the defendant, in pursuant to such direction, furnished his suit property as security for the satisfaction of the decree, then such furnishing of security by the defendant will bind and prevent him from dealing with the said property in any other manner. However, before ordering attachment, an opportunity is given to the defendant under Rule 5 (1) either to furnish security and produce the property at disposal of the court as and when required or to show cause as to why he should not furnish security. Once the defendant furnishes the security as contemplated under sub rule (i), then there is no necessity for ordering attachment of the said property in view of the fact that the very furnishing of security and producing and placing the property at the disposal of the court would in effect is a self disciplined attachment by the defendant himself. When such security is offered and accepted by the Court followed by recording of the same, then the defendant cannot be heard to say that he is not bound by such security or undertaking and he is at liberty to alienate the property in the absence of any attachment made by the Court. In effect furnishing of such security is in lieu of attachment and not in the

absence of attachment.

10. At this juncture, it is useful to refer Order 38 Rule 6 C.P.C. which deals with the stage at which attachment has to be made. The following is the said provision:

Order 38 Rule 6 C.P.C.

6. Attachment where cause not shown or security not furnished:--(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

11. A perusal of the above provision would show that only when the defendant fails to show cause or fails to furnish the security as required under sub rule (i) of Order 38 Rule 5 C.P.C. the court may order the attachment of the property. Further, such rule (ii) of Order 38 Rule 5 C.P.C. shows that even after such attachment, if the defendant furnishes the required security, the court shall withdraw the order of attachment or make such order as it thinks fit. In fact, sub Rule (ii) of Order 38 Rule 5 C.P.C. which was inserted by Act 104 of 1996, makes it abundantly clear that an attachment made without complying the provisions of sub rule (i) of Order 38 Rule 5 C.P.C. is void. Thus, the reading of Order 38 Rule 5 C.P.C. in its entirety would make it abundantly clear that furnishing of security by the defendant before the court below in response to notice is as good as attaching the same and merely because an order of attachment was not followed in pursuant to the furnishing of such security, it does not mean or be construed that the defendant is free to deal with the property according to his will and pleasure.

12. I have already extracted the recitals of the security given by the defendant supra. Form No. 6 shows in Appendix F of CPC is the format in which the furnishing the security for the production of the property to be made. The same is extracted hereunder:

No. 6 SECURITY FOR THE PRODUCTION OF PROPERTY

(O. 38, r. 5) (Title)

Whereas at the instance of..., the plaintiff in the above suit,...the defendant has been directed by the Court to furnish security in the sum of Rs....to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed;

Therefore I.... have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and

place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs.or such sum not exceeding the said sum as the said Court may adjudge.

Schedule Witness my hand at...this...day of...19....

Witnesses

1.

2.

(Signed)

13. A comparative study of both this Form No. 6 and the security given by the defendant would show that both are in verbatim same, in same format and in strict compliance of the requirement under Order 38 Rule 5 C.P.C. Further, from the reading of the recitals in the said security given by the defendant, it could be seen that it was not a simple undertaking not to alienate the property. On the other hand, he had bound himself to produce and place the property at the disposal of the court as and when required for the satisfaction of the decree. Further, if the order made on 07.02.2001 in the application filed under Order 38 Rule 5 C.P.C. is perused, it clearly shows that the defendant had offered the entire petition mentioned property as security to the suit debt and the value of the immovable property offered as security satisfied the suit claim. The said order further shows that the defendant had categorically asserted that he would produce and place the property at the disposal of the Court as and when required by it. Thus, the court by accepting the security so made had consequently recorded the same. From these facts, three things are evident viz., security offer of security, acceptance of the same and recording it by the Court. Since the defendant had offered the security and the court had accepted the same and recorded it, there was no need or occasion for the Court to make an order of attachment before judgment. No doubt, the plaintiff objected to mere furnishing of security and he wanted some other document as security. The court below has rejected the same by accepting that the property offered satisfied the suit claim. When that being the order made in the application filed under Order 38 Rule 5 C.P.C., I am unable to appreciate the finding of the court below that the property cannot be proceeded with since it was not attached by the court. Since the very settlement of the property by the defendant in favour of his parents is void transaction the same should have been ignored by the Court.

14. No doubt, the court below has relied on the decision by this Court reported in M.V. Rajasekaran Vs. Balagangadharan and another . A perusal of the said order would show that the defendant therein had only given an undertaking before the court not to alienate the property therein till security was given. Thereafter, the defendant alienated the property to some other third party. Taking note of such

facts, the learned single Judge observed that there was only an undertaking and there was no order of attachment when the alienation was made on 26.06.1980. The relevant paragraph No. 5 of the judgment is extracted hereunder:

5. After a careful consideration of the contentions raised by the learned counsel on either side, I am of the view that the order of the court below is quite in accordance with law and calls for no interference by me. So far as the present case is concerned, admittedly, there was only an undertaking, and there was no order of attachment as such. In view of the said position, there was no occasion for effecting any attachment of the bus at that point of time, and it is also not argued that there was any actual attachment effected pending suit. As stated supra, the attachment was effected only on 10.09.1981 after the executing court ordered attachment on 09.09.1981. As against this position, the first respondent claims rights to the vehicle by virtue of his purchase and transfer made in his favour as early as on 26.06.1980.

15. From the perusal of the facts and circumstances of the said case, it would show that they are totally different and distinguishable from the facts of the present case. In that case, an attachment was effectively made only on 10.09.1981 and the alienation was made on 26.06.1980. Thus, the learned Judge has found that when there was no attachment within the meaning of law on the date when the alienation was made, such right cannot be in any manner prejudiced by the decree obtained against such vendor/judgment debtor.

16. In this case, the defendant, as already found, has not given any undertaking before furnishing the security. On the other hand, he had furnished the security itself as contemplated under Order 38 Rule 5 C.P.C. Therefore, reliance placed by the court below in *M.V. Rajasekaran Vs. Balagangadharan* and another is absolutely erroneous.

17. The learned counsel appearing for the respondent seriously and heavily relied on the decision of the Apex Court reported in 1991 (1) L.W. 23, *K. Muthuswami Gounder v. N. Palaniappa Gounder*, to contend that unless a charge is created by attaching the property in pursuant to the undertaking given by the defendant, the alienation made by him is valid as the property alienated was not the subject matter of attachment as there was no charge created over the property.

18. I have given careful perusal to the said decision of the Apex Court. Though prima facie it appears that the said decision is in support of the respondent herein, a deep study of facts and circumstances of the said case would show that it is not so as the facts and circumstances of the said case are standing on the different footing.

19. The facts before the Hon"ble Supreme Court in that case would show that a deed of the security executed by the party therein is not as the same deed of security executed by the defendant herein. In fact, the said deed of security in that case was extracted at paragraph No. 16 of the said order, which is as follows:

16. The deed of security executed in the case in O.S. No. 108 of 1950 between Messers. Sandanam Mudaliar and Co. v. Ganesan Pillai reads as follows:

Deed of security executed this the 12th day of April 1950 in favour of Coimbatore Sub-Court by M. Ganesan son of Magudapathi Gounder, Businessman & Agriculturist residing at Gowripuram, Karur Taluk, Dt. The aforesaid plaintiff A.M. Sundara Mudaliar has filed the suit against me for recovery of Rs. 6,493.13 annas with subsequent interest and costs. He has also obtained an order for attachment before judgment of the monies payable to me from South Indian Railway. In order to vacate the order of the aforesaid order for attachment before judgment, I have filed an application I.A. No. 811 of 1950 in the said suit O.S. No. 108 of 1950.

As per the order of this Hon"ble court, I have executed this deed of security in the sum of Rs. 7,000/- and subsequent interest and cost over my self acquired properties in my possession and properties which are nanja lands and are described in the schedule. In the event of a decree being passed in the suit, I will not alienate the properties till the decree is discharged. The properties set out hereunder belong to me under right of purchase dated 14.10.46. There is already a prior mortgage over the properties for a sum of Rs. 3,000/- in favour of one Vairavan Chettiar. These properties are capable of being plotted into house sites and therefore their present value is about Rs. 15,000/-. I hereby affirm that there is no kind of encumbrance whatsoever over the properties except the one mentioned above.

20. After extracting the said security and having found that the party therein had only given an undertaking that he will not alienate the property till the decree is discharged, the Apex Court has observed at paragraph Nos. 17 and 18 as follows:

17. A perusal of this document will indicate that there was an attachment before judgment for money payable to Ganesan by South Indian Railway and those monies stood attached to satisfy the decree to be passed in the said O.S. No. 108 of 1950. An application was filed by Ganesan to vacate the order of attachment in I.A. No. 811 of 1950 in O.S. No. 108 of 1950. In compliance with the order of the Court, he had executed a deed of security for a sum of Rs. 7,000/- and subsequent interest and costs over his self acquired properties in his possession described in the schedule. He stated that in the event of a decree being passed in the suit, he will not alienate the properties till the decree is discharged and, therefore, he describes the prior encumbrances in respect of the properties as on the date of the execution of the security bond. A charge is an obligation to make payment out of the property specified. In the present case, there is no clear recital in the document of having created an obligation to make payment of the decretal amount out of the property in question.

18. The document Exhibit A-6 Security Bond does not in substance offer suit property by way of security. Even giving the most liberal construction to the document we cannot say that a charge as such has been created in respect of

the suit property for money to be decreed in the suit. All that it states is that in the event of decree being passed not to alienate the property till the decree is discharged, which is a mere undertaking without creating a charge. Therefore, we agree with the finding of the High Court that the document at Exhibit A-6 is not a charge. If that is so, the suit filed by the appellant has got to be dismissed.

(emphasis supplied)

21. A careful reading of the observation made in paragraph No. 17 in the above decision would show that there was no clear recital in the said document of having created an obligation to make the payment of the decretal amount out of the property in question. Therefore, the Apex Court came to the conclusion that the said deed of security executed in O.S. No. 108/1950 was only an undertaking not followed by creating any charge over the property. In my considered view, certainly, the said decision of the Apex court is not helping the respondent in any manner as the facts and circumstances are totally different and distinguishable. In this case, there is a clear recital of obligation to make payment of the decretal amount out of the property in question. When that being the deed of security executed by the defendant, then he cannot be permitted to say that he is not bound by such security.

22. At this juncture, I would like to refer to an old decision of our High Court in A.B. Gurumurthi Chetty Vs. Sella Perumal Pillai, wherein it was held as follows:

the Court's order of acceptance of the undertaking amounted in substance to an injunction restraining the party acting in breach thereof, and the Courts had power to deal with such breaches.

23. Learned counsel for the petitioner relied on 2001 (10) SCC 703, Western Press Pvt. Ltd., Mumbai v. Custodian and Others, to contend that whether an undertaking is given before the court is not required to be registered. I am of the view that the said decision is not relevant for the present case as that was not an issue before this court.

24. In Howrah Insurance Co. Ltd. Vs. Sochindra Mohan Das Gupta, it has been held at paragraph No. 11 as follows:

11. Section 145(c) of the CPC provides, to the extent material, that where any person has become liable as a surety for the fulfillment of any condition imposed on any person under an order of the court in any suit or in any proceeding consequent thereon, the decree or order may be executed against the surety to the extent to which he has rendered himself personally liable, in the manner provided for the execution of the decrees. By the surety bond, the appellant rendered itself liable as a surety for the fulfillment of the conditions imposed on the receiver under the orders passed by the court.

25. In Shanmugam and 2 others Vs. M/s. Syndicate Bank and 9 others, , a learned single Judge of this Court has observed that the universal donees are the legal representatives of the donors and therefore, there is no need to file a

separate suit to register the property of the donar to execute the decree. Learned counsel for the petitioner further relied on Dayanandan and Another Vs. Venugopal Naidu, to contend that the universal donee is a legal representative of the deceased and decree holder can proceed against the property in the hands of such universal donee in the execution of his decree. The learned counsel appearing for the petitioner relied on these decisions only to contend that the defendant having settled the property in favour of his parents and they being the universal donees, are equally liable to settle the suit claim. As I have found that the very alienation itself is bad and invalid in view of the security given to the court and the breach thereof, I need not go into this question as to whether they being the universal donees are bound by the decree or not.

26. The defendant having executed the security as contemplated under Order 38 Rule 5 C.P.C. has transferred the property by way of settlement in favour of their parents during the pendency of the execution proceedings. Undoubtedly such conduct would show his dishonest intention to defeat the interest of the decree holder. Such conduct is liable to be viewed seriously as it was made in violation of the security given to the court. Thus, I hold that the so called settlement deeds executed by the defendant in favour of his parents under document Nos. 92 and 93/2007 registered on the file of the Sub Registrar, Thalaivasal are invalid, unenforceable and void transfers and the same will not bind the plaintiff while executing the decree. Thus, I set aside the order passed by the court below and consequently, allow R.E.P. No. 69/2006 to proceed further. The civil revision petition is allowed with cost. The connected miscellaneous petition is closed.