
(1991) 03 MAD CK 0033
In the Madras High Court
Case No : A.A.O. No. 122 of 1991

Kalyaniammal

APPELLANT

Vs

Punjab National Bank and others

RESPONDENT

Date of Decision : 06-03-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63, Order 38 Rule 5

Citation : AIR 1992 Mad 176 : (1991) 2 MLJ 342

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : N. Jothi, for K.M. Kodaiarasu, for the Appellant;

Judgement

1. The appeal is against the order in 1. A. No. 302 of 1987 in O.S. No. 53 of 1987 on the file of the Subordinate Judge, Tirunelveli. The

application before the Court below was one under O. XXI, R. 58, read with O. XXXVIII, R. 8, Civil P.C. The prayer was to release the

scheduled property From attachment made by the Court in I.A. No. 220 of 1987 in O.S. No. 53 of 1987. The suit was filed by the 1st

respondent herein against the husband of respondent 2, and father of respondents 3 and 4 for recovery of amounts due to the 1st respondent.

Pending suit, an attachment was sought with reference to the property, which is now in question, by the 1st respondent.

2. The case of the appellant is that the property in question was sold to her on 12-7-1985 for valuable consideration of Rs.45,000/- by the 2nd

respondent in the Court below under a registered sale deed. Respondents 2 to 4 herein are the legal representatives of the 2nd respondent in the

Court below, who died during the pendency of proceedings. The claim petition

was contested by the 1st respondent-Bank on the ground that the sale alleged by the appellant herein was not a genuine one and it was only in fraud of creditors.

3. The Court below has, after considering the evidence adduced by the appellant, come to the conclusion that the sale was in fraud of creditors

and the appellant was not a bona fide purchaser. Consequently, the application filed by the appellant was dismissed. Aggrieved by the same, the appellant has preferred this appeal.

4. On a perusal of the evidence adduced on the side of the appellant and the order of the Court below, I am convinced that the view taken by the Court below is well founded and there is no justification for interfering with the order of the Court below.

5. The appellant has examined herself as P.W. 1 in the application. In the cross-examination, she stated that she did not know anything about the

transaction, that one Velayutha Ganesan got the property for her and it was only through him, the negotiation was concluded. She stated that

nobody else knew about the sale. It was also her evidence that excepting herself, Velayutha Ganesan and deceased Subramania Moopnar,

nobody else knew about the transaction. According to her evidence, she gave the money only to Velayutha Ganesan and she did not pay the

money directly to Subramania Moopnar. Admittedly, she did not ask for any receipt from him in acknowledgment of the payment. It was also

stated that she had paid Rs.22,000/- in dribblets on several dates. She did not have any account with regard to payments. According to her, she

had calculated the same mentally. It was also her evidence that she did not know who Subramania Moopnar was till she paid Rs. 22,000/- She

admitted that she did not go to the Sub Registrar's Office and that no money was paid before the Sub Registrar. She did not know who attested

the document. She claimed that the property was let out to Subramania Moopnar, after she purchased the same from him. But she admitted that

the rent was collected only through Velayutha Ganesan and there was no agreement to prove the tenancy. She claimed that Velayutha Ganesan

used to bring the rent and take receipts from her for the payment of rent. She did not know whether Velayutha Ganesan had handed over the

receipts of Subramania Moopnar. She did not know as to whether the prior

mortgagee, by name Muthu, had given any receipt. She admitted that she did not file any receipt received from Muthu. She stated that Velayutha Ganesan might have filed the receipts. According to her, Velayutha Ganesan is her younger sister's husband. She deposed that she did not know whether Velayutha Ganesan was the nephew of Subramania Moopanar. According to her, she did not know who were all related to Velayutha Ganesan and that she knew only that Velayutha Ganesan was her sister's husband. Strangely she deposed that her husband Nallamuthu Moopanar did not know anything about the purchase. According to her, her husband was doing agriculture and she was a professional cook. She stated that she never went for any job. She admitted that she had no earning whatever. She admitted that the sale deed was only with Velayutha Ganesan and not with her. According to her, all the documents filed on her behalf were only with Velayutha Ganesan. She also admitted that the petition was filed only because Velayutha Ganesan asked her to file it. She admitted that she did not know any of the details mentioned in the petition. She also admitted that Subramania Moopanar instigated Velayutha Ganesan, who asked her to file the petition.

6. P.W. 2 is said to be a prior mortgagee and that mortgage is to be discharged by the appellant, as part of the sale consideration. Though it is not necessary to discuss his evidence in detail, a perusal of his evidence shows that a suspicion can arise as to whether the mortgage claimed by him is genuine or not. But I do not think it necessary at this stage to go into that. At present, I am concerned only with the claim made by the appellant. Hence, I do not propose to discuss the evidence of P.W. 2 in detail and suffice it to point out that he admitted that in the receipts stated to have been issued by him, he had not mentioned the dates of the respective payments. According to him, Velayutha Ganesan used to bring the receipts duly filled up and he used to simply sign them, However, he deposed that he did not know whether it was Velayutha Ganesan's handwriting or somebody else's handwriting. He also did not know whether Velayutha Ganesan was related to Subramania Moopanar.

7. P.W. 3 is Velayutha Ganesan himself. In his cross-examination, he admitted that he gave the information for filing the petition to the Advocate, he admitted that the appellant did not accompany him. He also admitted that the

case is being conducted only by himself. According to him, he concluded the negotiations for the sale, but he added that both himself and the appellant had negotiations with Subramania Moopnar. He admitted that the appellant did not know Subramania Moopnar. Even according to him, himself and the appellant alone knew about the payment of money to Subramania Moopnar. He stated that he had taken receipts from Subramania Moopnar for the payments made. He added that pronotes were taken from Subramania Moopnar then and there. According to him, the pronotes were taken in favour of the appellant. He admitted that none of the pronotes had been filed before Court, nor any receipt filed, to show, that payments were made to Subramania Moopnar. Later he went back on his statement and deposed that no pronote was written. He did not know as to why pronotes were not written. He did not know the terms of the sale deed. He stated that he did not know anything personally about the sale deed. He stated that he had attested the sale deed. He claimed that all the rental receipts were with him and he handed over them to the appellant. According to him, he used to receive the rent from Subramania Moopnar and hand over the same to the appellant. He stated that Subramania Moopnar was living in the next house to his. According to him, Subramania Moopnar was not related to him and that he knew about the attachment effected by the Court. He deposed that P.W. 2, mortgagee, refused to show the mortgage document. He admitted that no copy was taken of the mortgage deed and that till date, he had not got the copy of the mortgage deed. He deposed that the appellant did not have any land or house. According to him, the appellant and her husband were on good terms. In his re-examination, he stated that the appellant purchased the house without the knowledge of her husband and therefore, all the documents were with him. Again he was cross-examined and he stated that till date the appellant's husband did not know about the purchase of the property and therefore, she did not mention in the petition that the documents were with him.

8. What is stated above, is sufficient to show that there is no bona fide in the case put forward by the appellant. The case of the appellant has to be rejected even on the basis of the evidence adduced by herself and by Veiyulha Ganesan, examined as P.W. 3. The Court below has rightly taken

into account the aforesaid evidence and come to the conclusion that the claim made by the appellant is not bona fide and the alleged sale in her

favour was only in fraud of the creditors. The appellant cannot be said to be a bona fide purchaser for value in good faith. Consequently, the

conclusion of the Court below on facts, is correct.

9. Learned counsel for the appellant placed reliance on the Judgment of a Division Bench of this Court in Venkata Reddi v. Yallappa Chetty AIR

1917 Mad 4. It was held in that case that a judgment creditor attaching property, which is subject to a contract for sale, can only sell the property

subject to that obligation. The proposition laid down by the Bench will have no application to the present case. If there is a real agreement for sale

prior to the attachment, certainly that will prevail over the sale held in Court auction, pursuant to the Court attachment. That principle has recently

been upheld by the Supreme Court in Hamda Animal v. Avadiappa Pathar, 1990 TLNJ 33. That judgment has no bearing on the present case.

10. Learned counsel invited my attention to a similar ruling in Veerappa Thevar and Others Vs. C.S. Venkatrama Ayyar, That was also a case of

agreement to sell, prior to attachment. The Court held that the attachment fastens to the judgment debtor's right to recover the unpaid purchase

money. This principle will not apply to the present case, as on the facts, it is held that the sale claimed by the appellant is not a genuine one.

11. Then reliance is placed on the judgment in In the Matter of Deccan Commercial Bank Ltd., AIR 1946 Mad 174, wherein it was held that in

proceedings under O. XXI, R. 58, Civil P.C., the executing Court is concerned only with the question of possession of the property and should

not and cannot embark upon enquiries involving a decision as to the real, as opposed to the apparent, title to the property. It was observed that the

evidence, therefore, to establish that the transfer in favour of the claimant was fraudulent was inadmissible in those proceedings and if the judgment

debtor had reason to believe that the transfer was for any reason ineffective, inoperative or void against the creditors, the proper course was to

follow it up by way of a suit under O. XXI, R. 63, Civil P.C. That judgment was rendered under the Code of Civil Procedure, as it then stood, and

in 1976, the Code was amended by Act 104 of 1976. After the amendment by act 104 of 1976, all questions relating to properties, including the

question of title, have to be decided only in the claim proceedings. Under R. 58 of O. XXI, Civil P.C., 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 that 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 separate suit. Under the same rule, it has been provided that such adjudication shall have the same force and be subject to the same conditions as to appeal or otherwise, as if it were a decree. It is only under the provision, the present appeal has been filed. As under the said rule, before amendment, there was no provision for appeal, but there was a provision for a suit under R. 63 of O. XXI of the Code, that was referred to by learned Judge in the above decision and that will not have any application, after the amendment of the Code in 1976. Hence, the contention that the Court below ought not to have gone into the question of title, cannot be accepted.

11-A. In *Bedanand Rai v. Nabokumar Singh*, AIR 1938 Patna 161, to which my attention is drawn, the Court held that before the provisions of R. 5 of O. XXXVIII of the Code could come into play, the Court has to satisfy that transfers were going to be made by the defendant after the suit had been filed and that such transfers were with the object of obstructing the plaintiff, if he won the suit in executing the decree and mere allegations to that effect were of no avail, but the facts must be positively proved by satisfactory evidence. This case relates to the principles to be applied by a Court before passing an order of attachment under O. XXXVI. R. 5, Code of Civil Procedure. That stage has indeed passed in this case and attachment has been effected and the appellant has come forward with the claim petition. It is not as if the appellant's claim is sustainable, as the Court has now found that the sale put forward by the appellant was not a genuine one and it was not open to the appellant to raise any contention with regard to the correctness or otherwise of the order of attachment.

12. Learned counsel then relied on the judgment of Allahabad High Court in *Auto Sales Vs. Smt. Shushila Sinha and Another*, . It was held therein that the question of benami cannot ordinarily be gone into in proceedings under O. XXXVIII, R. 5 or under O. XXI, R. 58. That was also a case

under the Code before amendment by Act 104 of 1976 and that will have no application to the present case, after amendment by Act 104 of 1976.

13. Learned counsel placed reliance on Banta Singh Vs. Dy. Director of Consolidation and Others, , wherein the Court held that an order of attachment before judgment creates no charge and therefore, does not affect subsequent private sale made in performance of the earlier agreement to sell entered into before attachment. This case is similar to the one referred to earlier in Venkata Reddi v. Yellappa Chetty, AIR 1917 Mad 4 and that will have no bearing on the art-sent case. As the sale in favour of the appellant is found to be not true, the principle laid down in the above case, will not apply.

14. Hence, I reject the contentions put forward on behalf of the appellant and dismiss the appeal.

15. Appeal dismissed.