
(2014) 03 MAD CK 0074

In the Madras High Court

Case No : C.M.A.(MD) No. 230 of 2012 and M.P.(MD) No. 2 of 2012

S.R. Ratheesh

APPELLANT

Vs

S. Ponnaiyan and Others

RESPONDENT

Date of Decision : 20-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 38 Rule 10, Order 38 Rule 38, Order 38 Rule 5, 64

Citation : (2014) 03 MAD CK 0074

Hon'ble Judges : K. Kalyanasundaram, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

K. Kalyanasundaram, J.—This appeal is filed challenging the order made in unnumbered EASR. No. 4901 of 2011 in EP. No. 90 of 2010 in O.S. No. 21 of 2010 by the District Judge, Kanyakumari at Nagercoil. Brief facts of the case are that the appellant is a third party to the suit in O.S. No. 21 of 2010. The 1st respondent herein had instituted the suit on 17.02.2010 for recovery of a sum of Rs. 1,20,00,000/- The suit was decreed on 13.08.2010 and he filed a petition in E.P. No. 90 of 2010 for recovery of a sum of Rs. 1,40,66,300/-. In the execution petition, the appellant filed an application to raise attachment in respect of Item No. 17 in the schedule given in the execution proceedings contending that he instituted a suit in O.S. No. 106 of 2011 for recovery of money of Rs. 17,50,000/- and in that suit, he filed an application I.A. No. 301 of 2011 for attachment before judgment. The District Court, Kanyakumari, had passed an order of attachment in respect of the property in question.

2. It is further submitted that the 1st respondent in O.S. No. 21 of 2010 filed an application for attachment of properties of the judgment debtor and the trial court has ordered attachment of the properties of item Nos. 1 to 17. Subsequent to the decree passed in the suit, he has filed an execution petition to bring the properties for sale for realising the decree amount. In these circumstances, the

appellant filed the application to raise attachment in respect of Item No. 17 of the schedule of properties in the execution proceedings. The learned District Judge dismissed the application holding that the application is not maintainable in law. Challenging the order, this appeal is filed.

3. Heard Mr. G. Prabhu Rajadurai, learned counsel for the appellant and Mr. Puhazh Gandhi, learned counsel for the respondents.

4. Learned counsel for the appellant submitted that the appellant had filed the suit for recovery of money against the 2nd respondent and he also filed an application for attachment before judgment in respect of 17th item of the property mentioned in the execution petition and the same was ordered. The learned counsel further submitted that the 1st respondent, who was the plaintiff in O.S. No. 21 of 2010 had taken out an application to attach the property of the 2nd respondent judgment debtor in respect of 17 items of his properties worth about several crores, hence the 1st respondent decree-holder can bring the properties one after another to recover the amount and it is unnecessary to bring all the properties for sale.

5. Learned counsel further submitted that the appellant has a right to move an application under Order 21 Rule 58 to raise the attachment in respect of one item of the properties, but the learned Judge dismissed the application holding that he can not maintain such application. In support of his contention, the learned counsel has relied on the judgment reported in Kancherla Lakshminarayana Vs. Mattaparthi Syamala and Others, .

6. Per contra, learned counsel for the 1st respondent submitted that the 1st respondent had instituted O.S. No. 21 of 2010 on 17.02.2010 for recovery of money and the suit was decreed on 13.08.2010. To realise the decree amount, the 1st respondent laid an execution petition on 01.09.2010. Moreover, during the pendency of the suit, the 1st respondent had filed an application for attachment of the properties in item Nos. 1 to 17 before judgment under Order 38 CPC and the same was ordered by the trial court.

7. The learned counsel further submitted that even as per the case of the appellant, the judgment debtor borrowed money from him on 10.02.2011 and only thereafter, the appellant had filed the suit and sought for attachment of 17th item in the schedule of properties. This would prove that even before the appellant lent money to the 2nd respondent, on the petition taken out by the 1st respondent, the property in question was attached and his suit was also decreed. Learned counsel submitted that as per Order 38 Rule 10 of CPC, the appellant has no right to file the application to raise attachment in respect of the property in dispute.

8. Learned counsel further submitted that earlier attachment made pending suit has now merged with the decree and the subsequent attachment made at the instance of the appellant will not create any right. The learned counsel has relied upon the judgments reported in S.U.S. Davey Sons Vs. P.M. Naranaswamy and

Another, ; My. Forex Services (P) Ltd. Vs. City Men Forex and Travels Ltd. and Others, and Purna Chandra Basak Vs. Daulat Ali Mollah, .

9. In Kancherla Lakshminarayana Vs. Mattaparthi Syamala and Others, , the Hon"ble Apex Court has held that an agreement holder of a property whose suit for specific performance pending has locus standi to maintain application under Order 21 Rule 58.

10. Order 38 Rule 10 reads as follows:-

Attachment before judgment not to affect the rights of strangers, nor bar decree-holder from applying for sale.-- Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

11. In Purna Chandra Basak Vs. Daulat Ali Mollah, , it has been held as follows:-

In my view such a right comes within the meaning of that term in Order 38, Rule 10 of the Code and the attachment u/s 64 is subject to that right. It is true that this right is a right in personem but there is nothing in the rule which lends support to the view that it is restricted only to right in rem. The attachment also does not create any interest in or charge upon the property. It merely keeps it in custodia legis and prevents its alienation in certain cases. The attachment may not necessarily be of the property itself but of the right, title and interest of the debtor in the property at the date of the attachment. An attaching creditor can only attach the right, title and interest of his debtor at the date of the attachment and on principle, his attachment cannot confer upon him any higher right than the judgment-debtor had at the date of the attachment.

12. In My. Forex Services (P) Ltd. Vs. City Men Forex and Travels Ltd. and Others, , this Court had an occasion to consider the effect of attachment before judgment and at paragraphs 18 and 19, this Court has held as follows:-

18. The Division Bench has held that when an attachment is effected the person against whom the order is made is prohibited from transferring the property and under Order 38 Rule 10 Code of Civil Procedure, the Attachment Before Judgment shall not affect the rights of persons not parties to the suit nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

19. In AIR 1994 Guj 2 (cited supra) the Gujarat High Court has held that Attachment Before Judgment under Order 38, Rule 5 shall not affect the rights existing prior to the date of attachment and the order passed under Order 38, Rule 5 for attachment of property before judgment does not confer any title, charge, lien or priority in favour of a person attaching it. The Gujarat High Court has also pointed out that Order 38 Rule 10 that an attachment before judgment does not, in any way affect the rights of the persons, in respect of the disputed property who are not parties to the suit.

13. Indisputably, the 1st respondent had filed the suit in the month of February 2010 and the property in question was already attached pending suit and the suit was also decreed on 13.08.2010 and the appellant has filed the application under Order 21 Rule 58 to raise attachment only on the basis of the attachment order made in the suit filed in the year 2011.

14. In the light of the judgments referred to supra, the attachment order passed in the suit in O.S. No. 106 of 2011, shall not affect the rights existing prior to the order of attachment made in favour of the 1st respondent decree-holder in the suit in O.S. No. 21 of 2010. Further, the attachment order would not operate as bar against the 1st respondent from applying for the sale of the property in execution of the decree.

15. In the judgment relied on by the counsel for the appellant reported in Kancherla Lakshminarayana Vs. Mattaparthi Syamala and Others, , the Hon''ble Apex Court has held that the application filed under Order 21 Rule 58 is maintainable in law. However, considering the facts that the 1st respondent had instituted the suit in the year 2010 and the property was attached during the pendency of the suit and subsequently in execution proceedings, he is bringing the property for sale to realise the decree amount, the appellant has no legal right to assail the order of attachment. In view of my findings supra, there is no illegality in the order of the executing court and the appeal is dismissed accordingly. Consequently, M.P.(MD) No. 2 of 2012 is closed. No costs.