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S.Ravikumar, and ors. Vs. R.M.Manivasagam, and ors.

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Court : Chennai

Decided On : Aug-06-2010

Judge : R.Subbiah, J.

Acts : Code Of Civil Procedure (CPC) - Order XXI Rule 4

Appeal No. : Civil Miscellaneous Appeal No.3184 of 2008, Civil Revision Petition Nos.3521 of 2008 and 1414 of 2009 and connected M.Ps. C.M.A.No.3184 of 2008:

Appellant : S.Ravikumar, and ors.

Respondent : R.M.Manivasagam, and ors.

Advocate for Def. : Mr.G.Rajagopal, Adv.

Advocate for Pet/Ap. : Mr.Mounaswaminathan, Adv.

Judgement :

1. As all the matters arise out of the miscellaneous orders passed in a suit i.e. E.A.Nos.3 and 10 of 2006 filed in E.P.No.61 of 2005 and also the attachment order passed in E.P.No.61 of 2005 in O.S.No.225 of 2003 on the file of Additional District and Sessions Court (Fast Track Court No.III), Coimbatore, it is convenient to deal with them together.

2. The facts, which are necessary to decide the issue involved in all the matters, are as follows:

(a) The 1st respondent in C.M.A.No.3184 of 2008 and the sole respondent in both the revision petitions is one and the same person, by name, Manivasakam, who filed a civil suit in O.S.No.225 of 2003 as against the defendants, by name, Shanmugam and Baggyalakshmi, who are the revision petitioners, for recovery of a sum of Rs.10,84,200/- with interest stating that the defendants borrowed a sum of Rs.6.50 lakhs from him by executing a promissory note and also handed over the original sale deeds dated 10.09.1987 and 16.10.1988 in respect of the suit properties, by creating equitable mortgage for the due repayment of the amount under the promissory note and that thereafter, failed to pay any amount and hence, the plaintiff filed the suit for recovery of a sum of Rs.10,84,200/- with interest and in the event of failure of payment by the defendants, to order for sale of the hypothecated properties.

3. The defendants filed a written statement denying the loan amount and the trial court, on a consideration of both evidence oral and documentary, has decreed the suit, but dismissed the claim as against the hypothecation, on 15.03.2004. Against which, no appeal was preferred by the defendants. Thereafter, the plaintiff filed E.P.No.61 of 2005 for attachment of the suit properties.

4. During the pendency of the execution proceedings, the sons of the defendants, who are the appellants herein, filed E.A.No.3 of 2006 under Order 21 Rule 58(1)&(3) of C.P.C. stating that the suit properties were settled in their favour by their parents (defendants) by way of a registered settlement deed dated 30.11.2005 bearing registration No.5129/2005. Therefore, they have become the absolute owners of the suit properties and the judgment debtors had no right in the same and the properties can never be brought for sale and thus, they prayed to adjudicate their claim and to release the suit properties from attachment. The said application filed by the sons of the revision petitioners was dismissed by the Executing Court by an order dated 7.07.2008. Aggrieved over the same, the sons of the defendants filed C.M.A.No.3184 of 2008. Similarly, the revision petitioners/judgment debtors have filed E.A.No.10 of 2005 under Order 21 Rule 2 C.P.C.before the executing court stating that one Gandhimani, brother of the decree holder, obtained a power of attorney from them on 27.01.1999 and by the strength of which, the said Gandhimani sold the property situated at

Goundapalayam in favour of his brother, namely, the decree holder for a sum of Rs.1,36,529/- and he made the gain out of the said sale. Thus, the judgment debtors contended that the said sum of Rs.1,36,529/- has to be adjusted in the decree amount. The said application was contested by the decree holder, stating that the transaction referred to by the judgment debtors had nothing to do with the decree amount and the executing court cannot go beyond the decree and prayed for dismissal of E.A.No.10 of 2005. After hearing both sides, the executing court has dismissed the said application, by its order dated 7.07.2008. Aggrieved over the same, the judgment debtors filed C.R.P.No.3521 of 2008. The court below, after perusing the records, ordered attachment of the suit properties, by its order dated 24.04.2009, against which, the defendants filed C.R.P.No.1414 of 2009 before this Court.

5. Since this Court feels that it is better to deal with the matters separately, firstly, we consider the issue involved in C.M.A.No.3184 of 2008.

6. Learned counsel appearing for the appellants/sons of the judgment debtors submitted that respondents 2 and 3/judgment debtors have settled the suit properties in their favour by way of a settlement deed dated 30.11.2005, which was registered as Document No.5129/2005 and thereafter, the appellants have become the owners of the suit properties and the judgment debtors have no right in the same and therefore, the said properties cannot be brought for sale. But, the executing court, without properly appreciating the submissions made by them, dismissed the application on a finding that in order to avoid the payment of the decree amount, the settlement deed was executed in favour of the appellants subsequent to the filing of the execution petition and as such, such a transfer is a fraudulent one as per section 53 of the Transfer of Property. In this regard, the learned counsel for the appellants submitted that when the property was settled by way of a valid settlement deed, the question of applying the principles under section 53 of the Transfer of Property Act does not arise and relied upon the judgments reported in AIR (30) 1943 OUDH 354 (ABDUL GHAFFAR ..vs..ISHTIAQ ALI) and AIR (32) 1945 MADRAS 454 (SHANMUGHASUNDARAM PILLAI .vs.. PARVATHI AMMAL).

7. Learned counsel for the 1st respondent/decree holder made his submissions in support of the order passed by the court below.

8. Keeping in mind the submissions made by the learned counsel on either side and after going through the discussions made in the impugned order, I find that the trial court has passed a personal decree in favour of the 1st respondent on 15.03.2004, against which no appeal was preferred by respondents 2 and 3 and as such, it had reached its finality and after the execution petition was filed by the 1st respondent/decree holder, the respondents 2 and 3 had settled the properties in favour of their sons, who are the appellants. Now, the question that arises for consideration is, whether the settlement made after filing the execution petition, amounts to a fraudulent transfer or not? For this purpose, it would be appropriate to extract section 53 of the Transfer of Property Act, which reads thus: "53. Fraudulent Transfer:-

(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration. Nothing in this sub-section shall affect any law for the time being in force relating to insolvency. A suit instituted by a creditor(which term includes a decree holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transfer or shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made".

9. The very fact that the respondents 2 and 3 had chosen to settle the properties in favour of their sons after filing the execution petition by the 1st respondent would clearly show that the transfer of immovable properties was made only with an intention to defraud the creditor's right. The judgments relied on by the appellants

cannot be made applicable to the facts of the present case because, in the instant case, the application filed by the appellants was dismissed on the ground of fraudulent transfer, whereas the judgments stand on different footings. Therefore, I do not find any merit in the submission made by the learned counsel for the appellants and hence, this appeal is liable to be set aside. C.R.P.Nos.3521 of 2008 and 1414 of 2009:

10. Learned Senior Counsel appearing for the revision petitioners submitted that one Gandhimani, brother of the respondent took a power of attorney from them and thereafter, sold the property situated at Goundapalayam to the respondent himself and he made a gain out of the said sale subsequently by selling the property for a sum of Rs.21 lakhs. Therefore, the revision petitioners filed an application to adjust the sale proceeds in the decree amount. But the same was dismissed by the executing court without adjudicating the claim of the revision petitioners merely on the ground that the claim of the revision petitioners can be adjudicated only if the amount, which is sought to be adjusted, is payable under the decree and since the amount of Rs.1,36,529/- is not payable under the decree, the application under Order 21 Rule 2 cannot be allowed. In this regard, the learned senior counsel relied on the judgments reported in (2001) 1 MLJ 363 (KRISHNAN ..vs.. VALLIAMMAL) and 2006(3) CTC 67 (PADMA BEN BANUSHALI AND ANOTHER ..vs.. YOGENDRA RATHORE AND OTHERS) and submitted that the executing court had wide powers under section 47 of the Civil Procedure Code and section 47 gives jurisdiction to the Executing Court to decide the questions arising between the parties. Considering the fact that the brother of the respondent played a fraud on the appellants, the respondent is accountable to adjust the amount gained out of the sale of the property at Goundapalayam. Therefore, the executing court has ample powers to adjudicate the issue under section 47 C.P.C.

11. Per contra, the learned counsel for the respondent submitted that in the counter filed by the respondent before the court below, it has been specifically stated that the transaction of Goundapalayam property had nothing to do with the decretal amount. In fact, the issue with regard to the sale of the property at Goundapalayam was raised for the first time before the executing court. Had the

sale of the Goundapalayam property been part of the suit transaction, the petitioners might have brought this fact even before the trial court. Since the transaction was totally out of the scope of the decree, the executing court was right in dismissing the application. In support of his contentions, the learned counsel relied upon the decisions reported in AIR 1987 MADHYA PRADESH 262 (RAJEEV ..vs.. ARUN), AIR 1994 MADHYA PRADESH 37 (BADRIPRASAD ..vs.. MALLUBHAI), 1998-II M.L.J.119 (LAKSHMI AMMAL ..vs.. RAM CHETTI) and (1997) 1 SCC 373 (SULTANA BEGUM ..vs.. PREM CHAND JAIN).

12. By way of reply, the learned senior counsel for the revision petitioners submitted that the fact about the sale of Goundapalayam property by the brother of the respondent in favour of the respondent came to be known by the appellants only after passing of the decree in the trial court. Immediately, the power of attorney granted to the brother of the respondent was cancelled by them. In fact, the consideration of Rs.1,36,529/- mentioned in the sale deed dated 10.11.2001 was passed on to the revision petitioners. Under such circumstances, the trial court is bound to make the adjustment of Rs.1,36,529/- in the decree amount.

13. Heard the learned counsel for the parties.

14. It is the contention of the revision petitioners that one of the suit properties, namely, Goundapalayam property, was sold to the respondent fraudulently through the power of attorney of the revision petitioners, without their knowledge for a sum of Rs.1,36,529/- and hence, the said amount has to be adjusted in the decree amount. But the said contention was resisted by the respondent stating that the transaction of Goundapalayam property had nothing to do with the suit transaction. Hence, the executing court has dismissed the application as the transaction of Goundapalayam was out of the scope of the decree and the same cannot be agitated under Order 21 Rule 2 C.P.C.

15. Now, it is the contention of the revision petitioners that section 47 has wide scope and any question between the parties can be decided by the executing court in the interests of justice. In support of his contention, the learned senior counsel for the revision petitioners relied upon (2001) 1 MLJ 363 (supra), wherein it has been held as follows: "A suit filed by fraud at whatever later stage the fraud

committed on the part of the plaintiff came to be brought forth, the party complaining of fraud playing its part and resulting in a decree, can avail himself of the remedy of review or even the writ jurisdiction of the High Court since the remedy to move for recalling the order on the basis of the newly disclosed facts amounting to fraud of high degree cannot be foreclosed and no court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wrangled through fraud or misrepresentating of such a dimension that would affect the very basis of the claim. This Court has got powers to deal with such matters wherein the plaintiff has obtained a decree by playing fraud upon the other side especially under Sec.47 of the Civil Procedure Code.

16. In 2006(3) CTC 67 (supra), the Hon'ble Apex Court has held that "... The general power of deciding questions relating to execution, discharge or satisfaction of decree under Section 47 can thus be exercised subject to the restriction placed by Order 21, Rule 2, including sub-rule (3) containing special provisions regulating payment of money due under a decree outside the Court or in any other manner adjusting the decree".

17. A careful reading of the said judgments would show that even the general power under section 47 can be exercised subject to the restriction placed by Order 21 Rule 2 including sub-rule(3). Though it was contended by the learned senior counsel that under section 47, the executing court has wide scope, even the said power can be exercised only in consonance with order 21 Rule 2. In the instant case, the respondent has taken a specific defence that the transaction of Goundapalayam property had nothing to do with the suit transaction. When that being so, as contended by the learned counsel for the respondent, certainly, the Goundapalayam property was totally out of the scope of the decree. In this regard, a reference could be placed to the judgments relied upon by the learned counsel for the respondent. In 1998-II M.L.J.119 LAKSHMI AMMAL ..vs.. RAM CHETTI), it has been held as follows: "If a decree is adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder has to certify such adjustment to the court, which has to discharge the adjustment accordingly. If the payment or adjustment is not reported by the decree-holder, the judgment debtor can inform the court of such payment or adjustment within the stipulated time after notice to

decree-holder. An uncertified payment of money or adjustment which is not recorded by the court under O.21, Rule 2, cannot be recognised by the executing court".

18. In AIR 1994 MADHYA PRADESH 37 (BADRIPRASAD ..vs.. MALLUBHAI), it has been held as follows:

"The general and broader provisions of S.47 of the Code clothing the Court with the jurisdiction to decide all questions pertaining to execution, discharge and satisfaction of a decree cannot be allowed to defeat the special provisions of O.21, R.2 of C.P.C.dealing with adjustments of the decree. When the satisfaction of the decree is based on an adjustment, provisions of S.47 cannot be pressed into service unless the adjustment is recorded in accordance with R.2 of O.21 of C.P.C."

19. In (1997) 1 SCC 373 (SULTANA BEGUM ..vs.. PREM CHAND JAIN), the Hon'ble Supreme Court has observed as follows:

"22. Section 47, as pointed out earlier, gives full jurisdiction and power to the executing court to decide all questions relating to execution, discharge and satisfaction of the decree. Order 21 Rul3, however, places a restraint on the exercise of that power by providing that the executing court shall not recognise or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment debtor before the executing court, the latter, in view of the legislative mandate, has to ignore it if it has not been certified or recorded by the court.

23. The general power of deciding questions relating to execution, discharge or satisfaction of decree under Section 47 can thus be exercised subject to the restriction placed by Order 21, Rule 2, including sub-rule(3) which contain special provisions regulating payment of money due under a decree outside the Court or in any other manner adjusting the decree. The general provision under Section 47 has, therefore, to yield to that extent to the special provisions contained in Order 21 Rule 2 which have been enacted to prevent a judgment debtor from setting up false or cooked-up pleads so as to prolong or delay the execution proceedings".

20. Following the principles laid down in the said decisions relied on by the learned counsel for the respondent, I do not find any infirmity in the orders passed by the executing court while dismissing the applications filed by the revision petitioners since the sale of Goundapalayam property is a different transaction. Even if the revision petitioners feel that the respondent/decree holder had gained benefit out of the sale consideration, they are at liberty to file a suit for recovery of the said amount and the said transaction cannot be agitated in the present proceedings. Under such circumstances, both the revision petitions are bereft of merits and are bound to fail. For the reasons stated above, the civil miscellaneous appeal as well as the revision petitions are dismissed. No costs. Consequently, connected M.Ps.are closed.

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