

**IN THE COURT OF THE SUBORDINATE JUDGE, MELUR****Present: Thiru. S. Ganesan, B.Sc., M.A., B.L.,****Sub Judge, Melur.**Tuesday, the 19th day of March 2024**E.P.No.122/2020**

(Old E.P.No.215/2019 Principle Subordinate Court, Madurai)

in**O.S.No.53/2015**

(Principle Subordinate Court, Madurai)

V.R.Sathish Kumar,

...

Petitioner/Decree Holder

//Vs.//

1. Uchiyammal,

2. P.Raman,

3.R.Kalidass,

4.B. Ratnakali.

..... Respondents/Judgment Debtors

This Petition is coming on 18.03.2024 for final hearing before me in the presence of Thiru.TCS, Thillainayagam, R.M.Suresh, S.K.Mylavan, Advocates for the Petitioner/Decree Holder and Thiru.B.Murugan and V.Palani, Advocates for the Respondents/Judgment Debtors and upon hearing both sides and on careful perusal of case records, documents and having stood over for consideration till this day, this court delivered the following:-

ORDER

This petition is filed under Order 21 Rule 11, 66, 72 of 151 CPC to realise the amount mentioned in column G & H of this application together with interest and cost by court auction sale of the schedule mentioned property belonging to the respondents.

1. Brief case of the Petitioner/DH :-

2. This execution proceeding has been initiated against the respondents herein for recovery of sum of Rs13,84,528/- as on 11.04.2019 and further interest 6% per annum on the principal amount of Rs.9,53,700/-.

3. The petitioner/plaintiff filed a Civil Suit for recovery of money from the respondents/defendants in O.S.No.53 of 2015 filed before Principle Sub Ordinate Court, Madurai. To recover the money from respondents/defendants, the the petitioner/plaintiff has filed Interlocutory Application for attaching the respondents/defendants property in I.A.No.73 of 2015 in O.S.No.53 of 2015. The Hon'ble Principle Subordinate Court, Madurai ordered in I.A. No.73 of 2015 in O.S.No.53 of 2015 on 07.02.2015, attaching the respondents/defendants property. After attaching the property, on 25.02.2015, the property was attached by the Order 38 Rule 5 of CPC proceedings and attached the property. Furthermore, the attachment was duly entered in the Encumbrance Certificate

4. To execute the judgment and decree the petitioner/plaintiff has filed execution petition before this Hon'ble Court. To escape from the judgment and decree and fair and decretal order in I.A. No.73 of 2015 in O.S.No.53 of 2015. The respondents/defendants have sold the property by mentioning the UDR Survey number. The respondents/defendants never denied the R.S No.206/1A1. The petitioner/plaintiff duly attached the correct

property of the 1st respondent/1st defendant. To defeat the justice the 1st respondent/1st defendant has sold the attached property to one Selvi. The actual UDR survey No.85/1A1 which was wrongly mentioned as UDR survey No.385/1A1 in I.A. No.73 of 2015 in O.S.No.53 of 2015, but the petitioner/plaintiff has correctly mentioned the re-survey No.206/1A1 in I.A.No. 73 of 2015 in O.S.No.53 of 2015 as if in the sale deed dated 10.12.1999 in favour of the 1st respondent/1st defendant. Since the UDR survey number in the above execution petition was wrongly mentioned as UDR survey No.385/1A1 instead of 85/1A1 due to typical error in E.P.No.122 of 2020 in O.S.No.53 of 2015. Hence, the E.P has been filed.

5. Statement Of Objection Submitted By The Respondents/Defendants

6. Save and except those that are expressly admitted herein and all other allegations made in the petition are all false and are hereby denied.

7. This petition is not maintainable either on law or on facts. The petitioner is not entitled to get any relief what so ever from this Hon'ble Court as against these respondents/defendants. This execution petition is a premature one, since the petitioner/plaintiff has mentioned in clause "D" appeal if any is filled as "Nil", as a matter of fact the respondents/defendants have filed an appeal challenging the decree passed in O.S.No. 53 of 2015 as A.S.No.11/2019 which was transferred to the 1st Additional District Court, Madurai for disposal according to law.

8. The petitioner/plaintiff he has purposely and intentionally failed to mention the nature of the property and its correct survey number for the reasons best known to him. On this score alone the execution petition has to be dismissed **In-Limine**.

9. Even on the date of purchase of the property by the 1st respondent on 10.12.1999 as vacant site in its natham survey number is comprised as S.No.206/1A1 and its corresponding sub divided S.No.85/1D1V and the sale deed was registered as document No.3375/1999 with the Thamaraiipatti Sub Registrar Office. By referring the sale deed and its survey number the 1st respondent has availed financial facility by executing deed of mortgage deed on 31.08.2005 for construction purpose and also constructed a RCC house in respect of the extent purchased by her for which door No. 3/30-A was assigned by the concerned panchayat.

10. The mortgage was duly discharged on 7.8.2014 and after discharging the loan the 1st respondent has alienated the property for valuable consideration on 10.04.2015 wherein also the sub divided S.No.206/1A1V and its corresponding S.No.85/1A1V, door No.2/30A assessed in the name of 1st respondent in respect of the house constructed therein is all mentioned.

11. Under these circumstances, the allegation made by the petitioner/plaintiff that the property of the respondents/defendants was attached on 25.02.2015 and confirmed on 26.02.2015 is legally unsustainable. On this score alone, the execution petition filed by the petitioner/plaintiff for sell, the attached property for the satisfaction of the decree is unsustainable.

12. The UDR S.No.385/1A and its R.S.No.206/1A1 mentioned by the petitioner/plaintiff is wrong and it is no way connection with the property owned by the 1st respondent/1st defendant. The respondent has no chance or knowledge about the order of attachment before judgment obtained by the petitioner/ plaintiff, since he has obtained attachment for property comprised in S.No.206/1A1, S.No.385/1A1 as such the bonafide

requirement of the 1st respondent, she has alienated the property in favour of one Tmt.A.Selvi as early as on 10.04.2015 vide document No.1586/2015 together with the RCC construction made therein. Under these circumstances the present execution of the property filed by the petitioner/plaintiff for alienation of property which was already alienated to the 3rd party is legally unsustainable.

13. The property mentioned by the petitioner/plaintiff UDR S.No.385/1A1 corresponding natham S.No.286/1A1 is not owned by the respondents/respondents. The respondents have reserved their right to file additional statement of objection if any in future. Hence prayed to dismiss the petition with cost.

14. The point for consideration aroused is that

15. **Whether the petition has to be allowed or not?**

16. Point.

17. Heard both sides. Upon perusal of records, The E.P is for bringing the immovable property of the respondents for court auction sale for realisation of the decree amount.

18. This E.P.has been originally filed before the Principal Sub Court Madurai numbered as E.P.215/2019 and after the constitution of Permanent Sub court at Melur, it is transferred on 30.07.2020 and assigned renumbered as E.P.No.122/2020 on the file of this court.

19. The learned counsel for the DH contended that the it is a money decree and the property has been attached before judgment by the learned Principle Subordinate Court, Madurai ordered in I.A. No.73 of 2015 in O.S.No.53 of 2015 on 07.02.2015, attaching the respondents/defendants property and effected on 25.02.2015, as per the Order 38 Rule 5 of CPC

proceedings and duly entered in Encumbrance certificate. To defeat the decree and realisation of the decree amount, the JD has sold the property by mentioning UDR Survey number. It is also averred that The JD did not denied the Rs.No. 206/1A1. Further the UDR Survey number is 85/1A1 and and it is wrongly mentioned as UDR Survey number is 385/1A1 in the attachment petition due to typical error.

20. On the other hand, the learned counsel for the JD contended that the appeal has been filed against the decree and judgment before the honourable principal district court and the same was not mentioned. The property in Survey number is 206/1A1 purchased on 10.1.2.1999 as vacant site and it is sub divided into Survey number is 85/1D1V in Doc.No. 3375/1999.

21. It is also contended that she obtained mortgage and constructed house having D.No. 3/30-A and the same was discharged on 07.08.2014. After discharging the loan, the 1st respondent alienated the property on 10.4.2015 as per document 1586/2015. Therefore attachment of property on 25.02.2015 and confirmation on 26.05.2015 are not legally sustainable, the property is totally wrong with the property owned by the 1st respondent.

22. Considering the rival contentions, the decree was passed on 01.08.2018. As against the same there is no appeal or further proceedings appellate forum has been initiated by the judgment debtor as per the E.P. Averments. But the Judgment debtors contended that the A.S.No.11/2019 has been filed before the Principal District Court Madurai and the same was not disclosed in the E.P. Columns.

23. Upon verifying the case status of the Appeal, the Appeal suit No. 11/2019 has been disposed off on 12.10.2020 by the honourable 1st ADJ Court, Madurai. Mere non mentioning of the appeal is not a ground to dismiss the E.P.

24. Hence, there is no appeal or stay against the decree. This E.P is of the year 2019 the decree of the year 2019. The E.P is filed on 14.08.2019 and filed within period of limitation.

25. The decree holder averred that the petition mentioned property has already been attached by the order of the Principle Subordinate Court, Madurai ordered in I.A. No.73 of 2015 in O.S.No.53 of 2015 on 07.02.2015, attaching the respondents/defendants property. After attaching the property, on 25.02.2015, the property was attached by the Order 38 Rule 5 of CPC proceedings and attached the property. The respondent/JD contended that the property Survey number has been wrongly mentioned and there is no iota of relationship between the attach property and the property owned by the JD.

26. Further, the attachment made by the Principle Subordinate Court, Madurai ordered in I.A. No.73 of 2015 in O.S.No.53 of 2015 on 07.02.2015, attaching the respondents/defendants property. After attaching the property, on 25.02.2015, the property was attached by the Order 38 Rule 5 of CPC proceedings are revealed through the encumbrance certificate Ex.P1. The copy of the attachment order and pro-order has been already filed before this court. Further the Ex.R1 and R2 which are the order passed by the Tahsildar and also writ filed by the DH before the Hon'ble Madurai Bench of Madras High Court WP(MD)-16458/2015 disposed on 18.07.2023.

27. The Ex.R2 is disposed off. In all of these proceedings, the attachment made by the court has not been assailed.

28. The learned counsel for the decree holder argued that While the main suit ripped for trial, the petitioner/plaintiff stands as PW1 on 08.09.2016 filed his proof affidavit for deposing his evidence. Subsequently 20.10.2016, on the respondents/defendants has cross examined the PW1. While crossing the PW1, the respondents/defendants never denied the Survey number which is mentioned in I.A. No.73 of 2015 in O.S.No.53 of 2015. The respondents/defendants has asked question about the survey No.206/1A1 with the petitioner/plaintiff. The respondents/defendants never denied or asked about the Re-survey number which was mentioned in I.A. No.73 of 2015 in O.S.No.53 of 2015. In these circumstances, it is inferred that the survey number of attach property has not disputed.

29. Coming to the factum of attachment this court cannot go beyond the decree. Further, the property attached in the I.A.No.73/2015 has been mentioned as petition mentioned property in the E.P.

30. The attachment order was passed on 07.02.2015, attachment made effected on 25.02.2015, attachment absolute on 26.02.2015. It is corroborated through the copy of the attachment order and the petition. Further more, after the attachment order the 1st respondent has sold the property as per doc.No.1586/2015 on 10.04.2015. It is also not at all disputed by the JD that boundaries of the properties are different.

31. The JD also contended that the S.No.85/1D1V is the property sold by the 1st defendant to one Selvi. But no such boundaries were mentioned here. The mistake in the survey number will not bar attaching the property or bringing the property for sale.

32. As per sec-9 of the surveys and boundaries act, the boundaries prevail over survey number. In case of conflict between survey number and boundaries, the boundaries prevail, and as long as boundaries are mentioned and the extent is given, they will prevail regardless of the survey number.

33. It is for the judgment debtors to prove that the attachment of property is different from that of the property sold by them. Further more, the sale deed copy was also not produced by the JD. Therefore, this court finds that prima facie it was attached and there is no claim was made till date for the attachment of the property, as the attachment made by the trial court is wrong etc. Further, the attachment was already made absolute. Therefore, incontrovertible ground that the property sold by the judgment debtor is the attach the property is court regardless of wrong mentioning of survey number.

34. It is to be brought into the knowledge of the court about the Section 53(1) of Transfer of Property Act, 1882 reads as follows: "(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.

35. The intention of the judgment debtors was only to defeat or delay the creditor namely the decree holder, who have obtained the decree for recovery of money with interest and cost and further it cannot be construed as a bonafide transfer in good faith for valuable consideration in favour of any third party. Had there been a bonafide intention, the judgment debtors would not have settled the property in favour of the petitioner, their

mother without discharging the amount payable to the decree holders in the suit.

36. Even if there is only one creditor, the act of the debtors in transferring his properties to a stranger with a view to secrete the same and defeat the creditor would be a fraudulent transfer and as such the transfer could be set aside, if the transferee had notice of the circumstances and of the judgment debtor's evil design.

37. *2006 (5) CTC 245 (Pinna Thevar vs M.S. Maniam and another)* and referred to Section 64 of the Code of Civil Procedure, wherein It is held that the said provision is applicable in a case where the attachment was made prior to the sale of the property to a third party.

38. Further more, Section 64 of the Code of Civil Procedure, 1908, states that where an attachment of a property is made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is forbidden under Section 64 of the Code of Civil Procedure is a private transfer by the judgment-debtor of the property attached contrary to the attachment, that is, contrary to the claims of the decree holder under the decree for realization for which the attachment is effected.

39. Therefore, the sale made by the judgment debtor after the attachment is void as to the enforceable claims of the decree holder.

40. Other averments made in the counter are only flimsy. Therefore based upon the decree, the judgment debtor is the owner of the property at the time of attachment. Therefore this court is inclined to bring

the attached property for sale as per the provision of or 21 of CPC. Since Principle Subordinate Court, Madurai ordered in I.A. No.73 of 2015 in O.S.No.53 of 2015 on 07.02.2015, attaching the respondents/defendants property as per the Order 38 Rule 5 of CPC proceedings and attached the property, there is no need to attach afresh. Hence the property can be brought court auction sale. Hence, the point is answered accordingly.

41. Accordingly, this petition hereby ordered to be allowed by bringing the attached property for bringing sale by testing the immovable property as per the I.A.No.73/2015 will be just one in the circumstances of this case.

42. *In the result, this petition hereby allowed. Schedule attached property brought for court auction sale. Hence, test the property by 25.04.2024. Test batta in a week.*

Directly typed by me in my laptop and corrected and pronounced by me in open court, this the 19th day of March 2024.

Sd/-S.Ganesan
Sub Judge
Melur.

Petitioner/Decree Holder side Witness :- Nil

Petitioner/Decree Holder side documents:-

Ex.P1	27.08.2019	Encumbrance certificate	Certified copy
Ex.P2	01.08.2018	Decree copy	Certified copy

Respondents/Judgment Debtors side Witness:- Nil

Respondents/Judgment Debtors documents:-

Ex.R1	11.11.2016	Order passed by the Tahsildar, East	True copy
Ex.R2	08.09.2015	Copy of the writ petition MD.No.16458/2015	Certified copy

Sd/ -S.Ganesan

**Sub Judge
Melur.**

Draft/Fair Order
EP.No.122/2020
in
O.S.No.53/2015
Date : 19.03.2024