

(2009) 08 MAD CK 0357

Madras High Court (Madurai Bench)

Case No: CRP (PD) No's. 561 and 562 of 2009 and MP. No. 1 of 2009

M. Emelda Jothi

APPELLANT

Vs

M. Prabhakaran and F.
Maria John Joseph

RESPONDENT

Date of Decision: Aug. 28, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 11A

Citation: (2009) 5 LW 549 : (2009) 8 MLJ 1594

Hon'ble Judges: Aruna Jagadeesan, J

Bench: Single Bench

Advocate: T. Selvakumaran, for the Appellant; K.P. Narayanakumar, for R1 and A.
Saravanan, for R2, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Aruna Jagadeesan, J.

These Civil Revision Petition are filed against the order dated 22.12.2008 in IA. No. 517 and 516/2007 in OS. No. 40/2004 passed by the learned Subordinate Judge, Padmanabhapuram, holding that since the suit is restored to file, the order of attachment passed before the dismissal of the suit would automatically get revived and for proper adjudication, the wife of the petitioner/proposed 2nd defendant is a necessary party to be impleaded in order to find out as to whether the transfer effected in the interregnum period of dismissal and restoration of the suit was fraudulent or not.

2. The undisputed facts are that the respondents/Plaintiffs filed the suit for recovery of money against the petitioner and pending the suit, in IA. No. 110/204, an order of attachment of the suit property was effected by order dated 12.4.2004 under Order 38 Rule 5 of CPC. The suit was dismissed for default on 16.3.2005 and the

respondents filed an application on 12.4.2005 in IA. No. 303/2007 for restoration of the suit and the suit was restored by order dated 30.12.2007. In the mean while, the petitioner sold the property under attachment to his wife on 5.4.2005 under a registered sale deed and based on that, a divorce deed was executed between them.

3. After restoration of the suit, the respondents filed applications in IA. No. 516/2007 under Order 38 Rule 5 of CPC to attach the property and IA. No. 517/2007 to implead the wife of the petitioner as the 2nd defendant in the suit. The court below found that no order of attachment is necessary, as it would get automatically revived once the suit is restored to file and also allowed the application in IA. No. 517/2007 for impleadment of the petitioner/proposed 2nd defendant. Aggrieved over the said order, these Civil Revision Petitions have been filed.

4. Mr. T.Selvakumran, the learned Counsel for the petitioner would submit that the court below failed to consider that the sale deed in favour of his wife was effected only after raising of the earlier attachment i.e. after dismissal of the suit and before the restoration of the suit and as such, the impugned order is not sustainable in law. It is his contention that the order of attachment would not get automatically revived on the suit being restored to file and drew the attention of this court to the decision rendered in the case of Pavayammal and Anr. v. Muthusamy Gounder and Anr. 1997-3-LW-789, wherein this court has held that dismissal of a suit after passing of an order of attachment before judgement necessarily ceases after the dismissal of the suit even though the court did not pass an order withdrawing it.

5. The learned Counsel for the petitioners would place reliance on the decision of the Honourable Supreme Court rendered in the case of Vareed Jacob v. Sosamma Geevarghese and Ors. 2004-SAR-Civil-553, wherein the majority of the Bench consisting of two honourable Judges held that restoration of the suit would result in automatic revival of interlocutory orders, unless circumstances occurring during interregnum period or orders passed by the court speak to the contrary. However, the Honourable Mr. Justice S.B. Sinha dissented from the said opinion and held that the interim order will not revive on restoration of suit and if the court intends to revive such interlocutory orders, an express order to that effect should be passed. The dissenting Judge posed a question that when the property sold after the suit is dismissed for default and before the same is restored, is it possible to take a view that upon restoration of suit, the sale of property under attachment before judgement becomes invalid? and His Lordships' answer to the said question is in the negative and observed that by taking recourse to the interpretation of the provisions of the statute, the court cannot say that although such a sale shall be valid, but the order of attachment shall revive and such a conclusion by reason of a Judge-made law may be an illogical one.

6. Even according to the view of the majority of the Bench of the Honourable Supreme Court, the revival would be subject to the circumstances like sale etc.

occurring during the interregnum period. By 1976 amendment to CPC new Rule 11A has been inserted to clarify (i) the position as to whether the provisions of Order 21 Rule 57 apply to attachment made before judgement and (ii) that an attachment before judgement made in a suit, which was dismissed for default will not become revived on the restoration of the sit. Rule 11A(2) of CPC reads thus:

An attachment made before judgement in a sit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored.

So, dismissal of a suit may terminate the attachment before judgement, which would not revive merely on the suit being restored. It has now become clear from the above provision that on a dismissal of a suit, the attachment before judgement automatically comes to an end even without an express order to that effect, but on the suit being restored, the order of attachment before judgement is not revived automatically. Therefore, there cannot be automatic revival of the attachment before judgement if the suit is restored to file.

7. In the instant case, the sale has been effected in the interregnum period after the dismissal of the suit for default and before restoration of the suit and the sale cannot be held to be invalid. In the said circumstances, the impleadment of the wife of the petitioner is unnecessary, in view of the above said legal position. Under these circumstances, the order of court below made in IA. No. 516/2007, holding that the order of Srcm attachment made before dismissal of the suit will automatically become revived is not correct position of law and the same is liable to be set aside and accordingly, it is set aside. Like wise, since the sale effected between the petitioner and his wife has not been held to be invalid, the petitioner/proposed 2nd defendant is not a necessary party to be impleaded in the suit and therefore, the order made in IA. No. 517/2007 is also liable to be set aside and accordingly, it is set aside.

8. In the result, these Civil Revision Petitions are allowed. No costs. Consequently, the connected MP is closed.