

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 5056 OF 2014

ORDER:

The petitioner/defendant filed the present application under Article 227 of the Constitution of India, challenging the order dated 27.08.2014 passed in I.A. No.362 of 2013 in O.S. No.235 of 2011 on the file of the Senior Civil Judge, Adoni, wherein an application filed by the plaintiff under Order XXXVIII Rule 5 of C.P.C., for attachment before judgment, was allowed.

The facts in issue are as under :

The plaintiff, who is the respondent herein, filed a suit for recovery of Rs.5,22,272/- on the strength of a promissory note dated 17.08.2008. The suit was filed on 16.08.2011. An application for attachment of the plaint schedule property came to be filed on 13.03.2013 on the ground that the respondent/defendant is trying to alienate the said property.

A counter came to be filed denying the allegations made in the petition and also denying the execution of promissory note in favour of the plaintiff. It is stated in the counter that in order to purchase the schedule mentioned property and for construction of the building thereon, the defendant contacted debts from third parties and in order to discharge the said debts the defendant sold the plaint schedule property to one Buddamma @ Arunavathi under an agreement of sale dated 10.07.2012 after receiving part sale consideration. It is stated in the counter that subsequently the purchaser made some part payments and necessary endorsements were also made on the back of the agreement of sale. After receiving the entire sale consideration and in pursuance of an agreement of sale, the defendant executed a registered sale deed on 28.03.2013. In view of the above, it is stated that the plaintiff was aware about the transaction and the present application came to be filed only with a view to harass the defendant.

After considering the rival submissions, the Senior Civil Judge, Adoni hold that the petitioner is entitled for attachment of the petition schedule property before judgment since the issue of saleable interest can only be agitated by the subsequent purchaser and not by the defendant/respondent. Challenging the same, the present Revision is filed.

From the above, it is clear that on 10.07.2012 an agreement of sale was entered into by the defendant with one Arunavathi. Thereafter, on coming to know about the alienation of property, the plaintiff filed an application on 13.03.2013 under Order XXXVIII Rule 5 of C.P.C., seeking attachment before judgment. On 28.03.2013 the defendant herein executed a sale deed in favour of the purchaser. Subsequently, on 08.05.2013 a conditional attachment order came to be passed. From the above, it is clear that the petitioner herein executed the sale deed in favour of the purchaser after filing of an application under Order XXXVIII Rule 5 C.P.C. The defendant got marked Exs.R-1 and R-2 which are unregistered sale agreement dated 10.07.2012 and copy of sale deed dated 28.03.2013.

Reiterating the averments made in the application filed, the learned counsel for the petitioner submits that the property does not belong to him and as such the application filed by the plaintiff without making the purchaser as a party is not maintainable.

On the other hand, the learned counsel for the respondent submits that the intention of the defendant is clear from the facts stated above as he executed a regular sale deed after filing of an application under Order XXXVIII Rule 5 of C.P.C. According to him, when he is not having any saleable interest he cannot raise any objection for attachment. According to him, it is only the purchaser who has to raise objection for the attachment and the petitioner has no locus to file this C.R.P.

As seen from the record though a conditional attachment was passed on 08.05.2013, no third party has come forward and filed a petition raising an objection to the conditional attachment. Except denying the execution of the promissory note, the petitioner has not come forward either to furnish security or to show cause as to why he should not furnish security within the time fixed by the Court. As per Rule 6 of Order XXXVIII of C.P.C., where the defendant failed to show cause as to why he should not furnish security or failed to security required within the time fixed by the Court, the Court may order that the property specified be attached. The Senior Civil Judge, Adoni relied upon a judgment of the Hon'ble Supreme court in **Kadiyala Rama Rao v. Gutala Kahna Rao**, wherein the Hon'ble Supreme Court in para 10 of it's judgment held as under :

"Order 21 Rule 90 does not envisage the issue of saleability and the learned Single Judge was in error in introducing such a concept under Order 21 Rule 90 of the Code. In any event as noticed above the issue of "saleable interest" can only be agitated by the purchaser in terms of Order 21 Rule 91 and not

in any event by the judgment-debtor. The ground of challenge is specific in the provision itself, namely, material irregularity or fraud and in the absence of any evidence or even an allegation in regard thereto in the petition under Order 21 Rule 90, question of introduction of the concept of no saleable interest or another opportunity to the judgment-debtor does not and cannot arise.”

Commenting upon the judgment, the learned counsel for the petitioner submits that the judgment of the Apex Court will not apply to the case on hand as the said application was under Order 21 Rule 90 which can be invoked only after passing of a decree. It appears that the court has referred to the judgment only to draw an analogy. However, this Court in **K.Chandrasekharan v. Vijay Bhargavi Chitfund Pvt. Ltd.**, while dealing with order XXXVIII Rule 5 C.P.C., held that “the procedure and modalities of attachment for recovery of decretal amount applies mutatis mutandis to attachment before judgment as well, as the Rules contained in Order XXXVIII do not lay down any particular method of attachment before judgment. It only specifies the circumstances and the contingencies in which attachment before judgment could be ordered by the Court, the adjudication of claims to property and the removal of attachment.”

From the judgments referred to above, it can be said that there is no bar for the Court to order attachment before judgment in the absence of any objection from the subsequent purchaser.

Apart from that it is to be seen that even if a decree is passed the same cannot be executed since the subsequent purchaser is not made a party to the proceedings. Therefore, if the purchaser is aggrieved by the said order, it is always left open to him to raise the objection with regard to attachment of the property if any. Even according to the petitioner, he has executed a sale deed after filing of an application under Order XXXVIII Rule 5 C.P.C. and since he has no saleable right, the question of the objections to the attachment before judgment would not arise. Having regard to the said circumstances, the order under challenge wherein the plaintiff was held entitled to attachment of schedule property before judgment warrants no interference.

Accordingly, the Civil Revision Petition is dismissed.

As a sequel to it, miscellaneous petitions pending if any, in the C.R.P. shall stand closed.

C. PRAVEEN KUMAR, J

Date:01.05.2015

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