

HON' BLE SRI JUSTICE Dr. B. SIVA SANKARA RAO

SECOND APPEAL No.459 of 2017

JUDGMENT:

This Second Appeal is arisen out of the judgment and decree dated 31.03.2017 in A.S.No.129 of 2013 on the file of the IV Additional District Judge, Kakinada, against the dismissal of the claim petition in E.A.No.245 of 2012 in E.P.No.115 of 2011 in O.S.No.498 of 2010 on the file of the I Additional Senior Civil Judge, Kakinada filed by the non-possessionary unregistered sale agreement holder as claimant by name, Ramayanam Satish Kumar against the decree holder by name, Thamada Bhaskara Rao of the money decree based on a promissory note said to have been executed by the judgment debtor by name, Smt.Pilla Supraja.

2. Heard both sides.
3. The parties herein are being referred with their names, to avoid confusion and for more clarity.
4. The facts in brief for the purpose of second appeal are that P.Supraja said to have been entered non-possessionary unregistered contract for sale (agreement of sale) on 28.02.2010 for Rs.2,000/- per square yard for 161.16 square

yards covered by Sy.No.290/ 2 of Ramanaiahpetta of Kakinada Rural Mandal within the Kakinada Municipal Corporation limits, which is a vacant house site surrounded by houses. The agreement holder, R.Satish Kumar entered the agreement having paid Rs.2,00,000/- as advance and maintained the suit in O.S.No.40 of 2012 renumbered as 255 of 2012 before the II Additional Senior Civil Judge, Kakinada. Undisputedly, T.Bhaskara Rao, who stated, lent the amount under promissory note dated 08.09.2008, was not made a party to the specific performance suit maintained by R.Satish Kumar against P.Supraja supra.

5. The said T.Bhaskara Rao, who maintained suit for recovery of the said amount based on a promissory note so called lending of Rs.6,00,000/- with interest at Rs.2/- p.a., maintained the suit claim in O.S.No.498 of 2010 for Rs.8,82,000/- or so. It is, at the time of filing of the suit for recovery of the amount sought for attachment before judgment in I.A.No.617 of 2010 ordered on 08.09.2010 and affected on 20.09.2010. Even in the money suit of T.Bhaskara Rao against P.Supraja and R.Satish Kumar, prior agreement holder thereunder made a party. The fact further remains from the above also clear that the suit for specific performance is subsequent to the date of suit for recovery of

money and attachment before judgment. So far as the non-possessory sale agreement concerned, it is difficult to presume any notice including deemed notice contemplated by Section 3 of the Transfer of Property Act but for so far as the attachment before judgment since affected before the date of filing of the suit for specific performance it can be taken as a deemed notice.

6. From this, the ex parte money decree was granted against P.Supraja in favour of T.Bhaskara Rao vide decree and judgment and practically with no lapse of time, since, it was an ex parte decree and consequently, the money decree holder, T.Bhaskara Rao filed E.P.No.115 of 2011 for execution of the decree in O.S.No.498 of 2010. During pendency of the execution proceedings in E.P.No.115 of 2011, based on the subsequent suit for specific performance in O.S.No.40 of 2012 preceded by notice issued by R.Satish Kumar against P.Supraja from her contentions of the reply to the notice, from the suit filed, filed the claim petition in the year 2012 based on that unregistered non-possessory sale agreement dated 28.02.2010, as referred supra, even though, the suit is, few days or months, filed prior to the claim petition in E.A.No.245 of 2012; even later in the suit, the money decree holder, T.Bhaskara Rao is not impleaded as co-

defendant. However, the suit O.S.No.40 of 2012=O.S.No.255 of 2012 for specific performance of the contract for sale was decreed on 01.05.2014.

7. It is, in the meantime, the claim petition in E.A.No.245 of 2012 tried as a suit by the procedure contemplated for deemed decree to be passed, was disposed of by the learned I Additional Senior Civil Judge, Kakinada, on 23.04.2013. It is made clear there from that by the time of disposal of the claim petition, there was no decree for specific performance of the contract for sale in favour of R.Satish Kumar. It is subsequent to the said decree for specific performance granted on 01.03.2014 R.Satish Kumar-decree holder pursuant to the non-possessionary unregistered sale agreement dated 28.02.2010 and pursuant to the decree, filed execution petition for registration of sale deed as contemplated by Order 21 Rule 34 C.P.C. and obtained sale deed pursuant to the draft through Court.

8. It is, from the dismissal of the claim petition supra and subsequently obtaining of the decree in specific performance supra, appeal in A.S.No.129 of 2013 against the claim petition dismissal order maintained by R.Satish Kumar by showing T.Bhaskara Rao and P.Supraja, who are the decree holder and judgment debtor as respondents to the claim

petition and to the appeal. The appeal was also disposed of on 31.03.2017 from hearing of both parties. However, it was not considered the additional evidence application filed by the said R.Satish Kumar/ appellant, which is nothing but the sale deed executed pursuant to the decree for specific performance as additional evidence. The additional evidence application is supposed to be decided by the Court in either way, by virtue of the provisions of Order 41 Rules 27 to 29 if not properly explained and if it is otherwise required for the effective adjudication of the *lis* by invoking Order 41 Rule 27 (1)(b) C.P.C. as also held by the Apex Court in KRM Reddy Vs M/s Net work inc.,¹. reiterated by this Court in Cheedella Padmavati Vs. Cheedella Radha Krishna Murthy². It was not done by the lower Court in deciding the appeal against the dismissal of the claim petition of subsequent specific performance decree holder pursuant to the sale agreement *supra*. It is there from maintained the present second appeal by the unsuccessful claim petitioner non-possessory un-registered agreement holder, who during pendency of the appeal against dismissal of the claim petition, having obtained pursuant to the decree for specific performance

¹ 2008(1) ALT 10 (SC)

² 2015(5)ALT 634

sale deed, filed the sale deed that was not referred in the lower appellate Court's judgment.

9. From the above factual background, the following substantial questions of law are framed, while admitting the second appeal:

1. Whether the prior unregistered and non-possessory sale agreement prevails over the subsequent attachment before judgment for recovery of the suit claim based on promissory note and what are the equities in the event of the suit for recovery of money decreed ex parte and the suit for specific performance of the contract for sale also decreed on contest subsequent to the money decree in respect of recovery of money and in enforcement of the specific performance including from execution of sale deed by the Court pursuant to the specific performance decree and whether the Courts below in the concurrent finding upholding the attachment to prevail over the sale agreement are correct, more particularly, from the amendment to Section 64 C.P.C. without any amendment to the two limbs of Order 38 Rule 10 C.P.C.
2. To what result?

11. In deciding the above substantial questions of law without need of referring to the factual matrix, since referred supra, the important provisions relevant to extract are Section 64 C.P.C. prior and subsequent to the C.P.C. amendment by Act, 2002 w.e.f. 01.07.2002.

"64. Private alienation of property after attachment to be void.- (1) Where an attachment has been made, any private transfer of delivery of the property attached or of any interest therein and any payment to the judgment-

debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

64. Private alienation of property after attachment to be void.(1) Where an attachment has been 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.

*(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.]

Explanation. For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

12. Further, Order 38 Rules 10 and 11A C.P.C. reads as follows:

10. Attachment before judgment not to affect 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-A. Provisions applicable to attachment. (1) The provisions of this Code applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of Rule 11.

(2) An attachment made before judgment in a suit 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.

13. Sections 54 and 40 of the Transfer of Property Act, read as follows:

54. "Sale" defined :- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made :- Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible things, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property, takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale :- A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

40. Burden of obligation imposing restriction on use of land, or of obligation annexed to ownership but not amounting to interest or easement :- Where, for the more beneficial enjoyment of his own immoveable property, a third person has independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment in particular manner of the latter property, or

Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon, such right or obligation, may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

14. Sections 17, 23, 47 and 49 of the Indian Registration

Act read as follows:

17. Documents of which registration is compulsory :- (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No.XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely :--

(a);

(b);

(c);

(d);

(e);

(f); and

(g) agreement of sale of immovable property of the value of one hundred rupees and upwards :]

Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

23. Time for presenting documents :- Subject to the provisions contained in Sections 24, 25 and 26, no document other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution :

Provided that a copy of a decree or order may be presented within four months from the day on which the decree or order was made, or, where it is appealable, within four months from the day on which it becomes final.

47. Time from which registered document operates :- A registered document shall operate from the time from which it would have commenced to operate if no

registration thereof had been required or made, and not from the time of its registration.

49. Effect of non-registration of documents required to be registered :- No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall,--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered :

Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, [x x x x], or as evidence of any collateral transaction not required to be effected by registered instrument.

15. Had it been impleaded in the suit for specific performance, the decree holder of the so called promissory note money decree or atleast filed a third party appeal against that so called ex parte money decree by the said agreement holder-cum-decree holder in O.S.No.40 of 2002=255 of 2002, the outcome could be otherwise. It is for the reason the money decree was ex parte without contest by the judgment debtor, who is no other than defendant to the specific performance decree denied in the reply to the notice before suit for specific performance and even contested the suit for specific performance, the decree holder of money decree also did not make any third party

appeal against the decree for specific performance and had it been also, the things could be otherwise. However, the fact remains that with the necessary parties to the suit though not proper parties impleaded, from the above, there is even ex parte a money decree and there is on contest, a specific performance decree against the very judgment debtor by name, Smt.Pilla Supraja for money decree obtained by T.Bhaskara Rao for specific performance decree obtained by R.Satish Kumar respectively. The Court has to proceed thereby from the finality attained of the money decree and specific performance decree against the judgment debtor and the persons claiming any right through the said judgment debtor/defendant in both the matters viz., the so called decree holders either for recovery of money or for specific performance of contract, as the case may be.

16. In this background, with no need of reproduction from the very Section 54 of the Transfer of Property Act, it deals not only of sale but also contract for sale to an agreement of sale and if it is a possessory sale agreement or agreement later evidencing delivery of possession in writing, there is another protective shield of invoking doctrine of part performance under Section 53A of the Transfer of Property

Act irrespective of the suit for specific performance barred by limitation prescribed by Article 54 of the Indian Limitation Act as laid down by the Apex Court in Shrimant Shamrao Suryavanshi & Anr. Vs. Pralhad Bhairoba Suryavanshi³.

17. Coming to Section 40 of the Transfer of Property Act, which also no way requires reproduction again the second limb relevant for the purpose speaks, where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon, such right or obligation, may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands. No doubt, it speaks of the bonafide transferee for consideration. Thus, bonafide transfer of a prospective right or enforceable right is not the wording.

18. From this now coming to Section 17(1)(g) of the Andhra Pradesh amendment to the Indian Registration Act came into force by Act 4/ 99 w.e.f. 01.04.1999, an agreement of sale of immovable property of the value of one hundred rupees and

³ 2002 (3) SCC 676

upwards is a compulsory registerable one, though the sale agreement in this case is dated 28.02.2000 subsequent to the said amendment came into force on 01.04.1999, it was not a registered one. The consequence of which as referred in the proviso to Section 49 of the Registration Act with Central amendment to it equally with Section 53-A of the Transfer of Property Act by Act 48/ 2001 w.e.f. 24.09.2001, which also no way requires reproduction but for to refer to it in saying that in a suit for specific performance the agreement though required to be registered not registered can be admitted in evidence. However, that concession is not available in the claim petition and that might be the reason in the claim petition, the sale agreement was not exhibited even for a collateral purpose, but for, in the suit for specific performance for the main purpose from the statutory concession of Section 49 proviso of the Registration Act supra.

19. In the factual scenario with reference to the law supra, coming to Section 47 of the Registration Act which also no way requires reproduction from what is stated supra that to be read at best with Section 23 of the Registration Act, that also reproduced supra, from the date of the document executed presented for registration other than for a will the

registration must be affected within four months and not later and with reference to Section 23 supra. So far as Section 47 supra, a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration, to say, even registration was later in point of time within four months from the date of execution, the sale deed even subsequently registered comes into operation from the date of execution. From this though an effort is made by the learned counsel for the claimant/ appellant that the document requires a comprehensive understanding by giving a liberal construction of its meaning to trace back to the earlier unregistered sale agreement as the same is outcome even from decreeing in a suit for specific performance, based on the unregistered sale agreement non-possessory dated 28.02.2000. Such a contention cannot be accepted from the clear and unambiguous meaning of Sections 23 and 47 of the Registration Act supra. Thereby, no credence is given to the contention and said contention is rejected for all practical purposes as bound by law, so to reject.

20. From this, now coming to unamended Section 64 of C.P.C. prior to 01.07.2002:

"64. Private alienation of property after attachment to be void.- (1) Where an attachment has been made, any private transfer of delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation:- For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

Order 38, Rule 10 C.P.C. reads as follows:

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

Order 38 Rule 10 CPC speaks, where an attachment has been affected, 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. Claims enforceable under an attachment include claims for the rateable distribution of assets. This Section, thereby, prohibits a private transfer or delivery of property attached or of any interest therein after attachment contrary to the attachment order in making it as void against all claims enforceable under the attachment to say a subsequent transfer in any manner including of any interest including by delivery is void. So far as enforceability of the attachment concerned, however, after the C.P.C. amendment by the Act

of 2002 w.e.f. 01.07.2002 sub-section (2) of Section 64 was incorporated before the explanation in relation to ratable distribution by making the other portion supra as sub-section (1). What sub-section (2) amended speaks even at the cost of repetition for the necessity is that nothing in this section (supra) shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.

21. Any ambiguity and cloud is clear by this incorporation of the amended sub-section (2) of Section 64 C.P.C. in protecting the prior agreements and prior alienations by transfer, before the attachment affected. Though it is the contention of the learned counsel for the claim petitioner/ appellant, R.Satish Kumar there from of the non-possessory sale agreement is saved though it is prior to the amended Act came into force, the same was relied in the suit for specific performance vis-à-vis the claim petition filed subsequent to the said amendment came into force in his saying sub-section (2) of Section 64 C.P.C. running in four contingencies, i.e., 1) of any private transfer, 2) delivery of property attached, 3) of any interest therein and 4) made in pursuance of any contract for such transfer or delivery

entered into. This submission is totally in ignoring the subsequent words 'and registered' before the attachment, any of the benefits arose if it is registered before the attachment and not by mere execution of the written document. Once that is missing in the case for the same is not only non-possessory but also unregistered sale agreement dated 28.02.2000, the claim petitioner/ appellant cannot get the benefit of the amended sub-section (2) of Section 64 C.P.C.

22. Coming to the other contentions, the expression of the three Judge Bench of the Apex Court in *Hamda Ammal v. Avadiappa Pathar*⁴ was based on pre-amended Section 64 C.P.C. in its saying even an unregistered document can be received as evidence for all purposes mentioned in the proviso to Section 49 of the Registration Act and the fact that the document of sale had been registered only after the attachment makes no difference, when the document is prior in point of time to the attachment. Here, the facts different from that expression are not only the amendment to Section 64(2) C.P.C. but also the amendment to Section 17(1) of the Registration Act in the State of Andhra Pradesh by incorporation of clause (g) and the amendment to Section 49

⁴ 1991(1) SCC 715

of the Registration Act by Central Act 48 of 2001 referred supra, thereby, the reliance placed on the expression in Hamda Ammal (supra) has no application by virtue of subsequent change of law, even by the time of filing the claim petition and suit for specific performance by the appellant herein.

23. Coming to the other expression placed heavily of another Single Judge of this Court in Adinarayana v. S.Gafoor Sab⁵, wherein also referred Hamda Ammal (supra) among others and the scope of Order 38 Rule 10 and Sections 40 and 64 C.P.C. In fact, though, the judgment was subsequent in point of time to the C.P.C. amendment to Section 64 incorporating sub-section (2) of Section 64 C.P.C. and also Section 17(g) of the A.P.Registration amended Act and Section 48 of 2001 Central Amendment to Section 49 of the Registration Act, those were not discussed nor taken into consideration therein, though simply reproduced amended Section 64 C.P.C. in para-13 of the judgment.

24. Coming to the expressions referred therein besides Hamda Ammal no way requires repetition among others, one is in Noordeen v. V.S.Thiru Venkita Reddiar⁶, under the principle amended Section 64 C.P.C., wherein it is held by

⁵ 2004(2) ALD 736

⁶ 1996 (3
) SCC 289

the Apex Court that the attachment before the judgment is an encumbrance preventing the owner of the property to create encumbrance, sale or create charge thereon. Attachment before judgment does not create any right, title or interest, but it disables the judgment-debtor to create any encumbrances on the property. There is no dispute on the proposition, but for, the person, who claims as a transferee is a bonafide transferee with absolute transfer and for consideration and without notice of the prior attachment before judgment, leave about no one can pretend no encumbrance from the deemed notice by virtue of the very attachment once ordered is affected as contemplated by the C.P.C. also from the presumption under Section 114 of the Indian Evidence Act of all official and judicial acts are duly performed to draw of attachment ordered and affected was duly affected.

25. The other expression of the Kerala High Court in *Narayanan Nair Ramakrishnan Nair v. Zacharia Kuriakose*⁷, a Single Bench held that a judgment made after a contract for specific performance does not affect a prior agreement to sell and attachment could only fasten the debtor's right to the unpaid purchase money. Even from this, what the Kerala

⁷ (AIR 1991 Kerala 152)

High Court held is an agreement holder has to pay the unpaid purchase money in claiming the relief for specific performance, has to recognize the right of the person who attached his property for the balance sale consideration.

26. Coming to another Single Bench expression of this Court in *D.V.Narsimharao v. P.Ramayamma*⁸, it was observed that though agreement for sale does not create any right, title or interest in the property under Section 54 of the Transfer of Property Act, it creates an interest in the property by operation of second paragraph of Section 40 of the Transfer of Property Act and this right prevails by operation of Order 38, Rule 10 C.P.C. It referred section 64 C.P.C. saying the rigour imposed under Section 64 C.P.C. does not prevail and the attachment before judgment does not prevail over the contract for sale. In fact, the Kerala High Court ignored the correct law in *Narayanan Nair* (supra) in its saying the agreement holder in a contract for specific performance has to recognize the attachment before judgment of the holder of a suit claim to be decreed so far as the non-payment of balance sale consideration to pass on concerned, that is not at all discussed. In fact, even from close reading of Section 54 of the Transfer of Property Act

⁸ 1987(1) ALT 718

with Section 40 of the Transfer of Property Act, the equitable enforceable right created in a contract for sale from the executant denies execution or not coming forward is to maintain a suit for specific performance, which is, in fact, a discretionary relief, the Court can decree or not to decree depending upon the facts of the case. Though, Section 10 of the Specific Relief Act, particularly, from the explanation (1) clearly shows in exercise of discretion by the Court in a specific performance suit, the breach of a contract to transfer cannot be adequately relieved by compensation of money in respect of the immovable property. For the same, as per Section 10(b) an adequate relief for non-performance to compensate except as otherwise provided in the chapter from other sections covered by Sections 9 to 25 including Section 20 of the Act, the discretionary relief, subject to the foundation including from the pleading laid down under Section 16 of the Act.

27. Coming to other expressions referred of the Madras High Court in Veeraraghavayya v. Kamala Devi⁹, wherein it was observed that where a purchase is subsequent to the attachment, but the agreement in pursuance of which the

⁹ AIR 1935 Madras 193

purchase is made, is prior to attachment, the purchase prevails against the attachment.

28. No doubt, in the case on hand, the suit O.S.No.40 of 2012 (255 of 2012) for specific performance in favour of R.Satish Kumar against P.Supraja was on contest decreed and the Court executed registered sale deed, which is pursuant to the non-possessory unregistered sale agreement dated 28.02.2010 earlier to the filing of the suit for recovery of money and attachment before judgment affected in 2010, to say, though the sale deed executed through the Court in a decree for specific performance is subsequent in point of time to the attachment traced back to the sale agreement prior to the attachment before judgment that can prevail. However, had it been the money decree holder, who sought the attachment impleaded in the suit for specific performance, it could be different it was not done and against the money decree, no third party appeal even filed.

29. The other judgment of the Madras High Court in Rebala Venkata Reddi v. Yellappa Chetti¹⁰ referred the same view and the subsequent Single Bench of the Madras High Court in Diravyam Pillai v. Veeran Ambalam¹¹, the observation particularly at page 831 referred was the question is not

¹⁰ AIR 1917 Madras 4

¹¹ 1939(2) MLJ 822

whether any interest has passed under the contract for sale but the attaching decree holder attaches not the physical property, but only the rights of the judgment-debtor in the property. Even from this, once there is a right of the judgment debtor in the property attached, which is subject to the prior sale agreement, it is for the unpaid purchase money there is a right what is remained as on the date of attachment.

30. Though, a contract for sale, does not having regard to the terms of Section 54 of the Transfer of Property Act, create any interest in or charge on the property, it does give rise to an obligation which limits the right of the judgment-debtor and the attachment of the right, title and interest of the judgment-debtor is subject to any such limitation by which the judgment-debtor was bound. Therefore, where subsequent to a contract to sell certain property, is attached in execution of a decree, the attachment does not prevail over the pre-existing contract to sell even though the attachment creditor has no notice of the contract to sell. The right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed

to bring the property to sale as if it remained the absolute property of the judgment-debtor. This expression also reiterates that prior contract for sale prevails over subsequent attachment before judgment or attachment in execution of a decree. However, so far as prevailing of the agreement for sale concerned, the agreement holder is under obligation to honour the attachment order out of what is to be performed under the contract for sale.

31. The conclusion arrived in the expression of the Single Bench of this Court in Adinarayana (supra) from the above in saying right prevails by operation under Section 47 of the Registration Act and Order 38 Rule 10 C.P.C. and the rigour imposed under Section 64 C.P.C. does not prevail is not fully correct from what is discussed supra so also for the case not coming under the spirit of Section 64(2) of the amended C.P.C.

32. Having regard to the above, the above substantial questions of law formulated are answered in saying the Courts below are not fully correct in dismissing the claim petition of the agreement holder, R.Satish Kumar, but for, to say the claim cannot be fully allowed of R.Satish Kumar against T.Bhaskara Rao and P.Supraja, who are the decree holder and judgment-debtor respectively of the money

decree, where there was also an attachment before judgment prior to filing of the suit for specific performance and what the right the agreement holder has on the date of filing of the suit for specific performance was having is at best under Section 55 of the Transfer of Property Act, the charge, at best over the property for recovery of the advance sale consideration by virtue of the wording of Section 55 statutorily like a charge to the purchase for recovery on the property of unpaid consideration, in the event of the suit for specific performance filed and on contest decreed by also impleading the money decree holder-cum-person, who attached the property from the deemed notice, it was not done, though otherwise had it been done, the limit of the agreement holder is to the balance sale consideration to answer to the attachment before judgment has right in the property, which is subject to the sale agreement.

33. In view of the above and from this Court's duty in the factual matrix to render equity to both the parties and any party who received under benefit has to restore that extent to the other to order restitution with pragmatic approach for Court should not be oblivious of any unmerited hardship to be suffered by any party as held by the Apex Court in City Bank

N.A. v. Hiten P.Dalal¹², it is just to say the claimant, R.Satish Kumar (the specific performance decree holder) has to pay the original suit principal amount of the suit claim of Rs.6,00,000/- to T.Bhaskara Rao (the money decree holder) which amount of Rs.6,00,000/- includes adjustment by receiving back the amount deposited in the suit for specific performance in the Court with accrued interest to meet the same and also that includes any amount earlier paid under any settlement proposal through mediator or any direction of this Court or the Courts below. The said amount has to be paid within eight weeks from today, failing which T.Bhaskara Rao, money decree holder is entitled to execute and recover said Rs.6,00,000/- with interest at 12% p.a. from today onwards for balance after adjustment of what is stated supra. For any further claim of the money decree holder, T.Bhaskara Rao is to proceed personally against respondent No.2/ judgment debtor, Smt.P.Supraja if there is any other property of her for the reason Section 56 C.P.C., speaks a female is not liable for arrest for any recovery of a money decree.

34. Accordingly and to the above extent, the Second Appeal is allowed with no costs.

¹² 2016(1) SCC 411

35. Consequently, miscellaneous petitions, if any shall stand closed. No order as to costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 03.04.2018

pab

L.R.Copy to be marked - yes



* HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

+ SECOND APPEAL No.459 of 2017

03-04-2018

Between:

Ramayanam Satish Kumar

...Appellant

Vs.

1. Thamada Bhaskara Rao and another ... Respondents

Counsel for the Appellant : Sri S Subba Reddy

Counsel for the Respondent No.1: A.K.Kishore Reddy

Counsel for the Respondent No.2: T.V.Jaggi Reddy

<Gist :

>Head Note:

? Cases referred:

¹ 2008(1) ALT 10 (SC)

² 2015(5)ALT 634

³ 2002 (3) SCC 676

⁴ 1991(1) SCC 715

⁵ 2004(2) ALD 736

⁶ 1996 (3)SCC 289

⁷ AIR 1991 Kerala 152

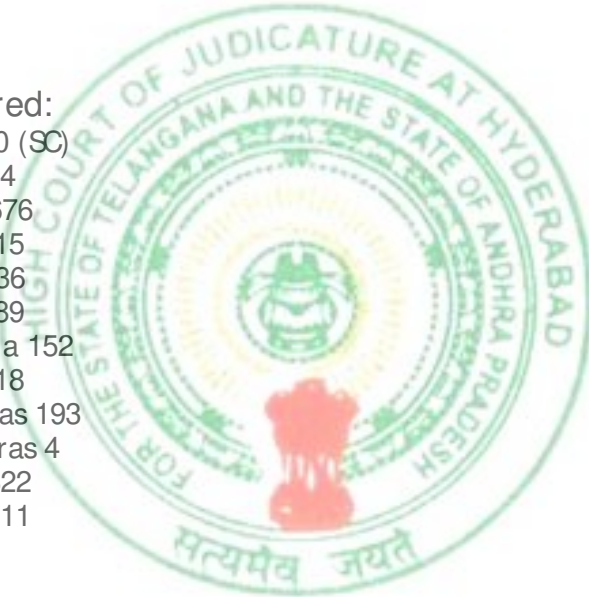
⁸ 1987(1) ALT 718

⁹ AIR 1935 Madras 193

¹⁰ AIR 1917 Madras 4

¹¹ 1939(2) MLJ 822

¹² 2016(1) SCC 411





IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

SECOND APPEAL No.459 of 2017

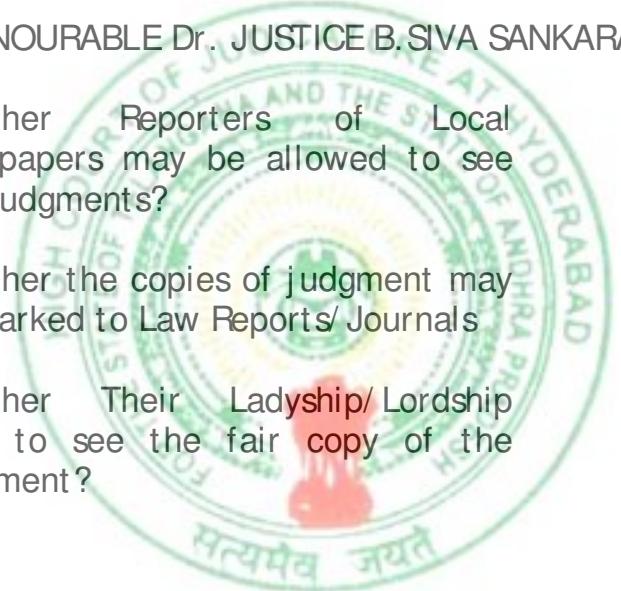
Between:
Ramayanam Satish Kumar ...Appellant

Vs.
1. Thamada Bhaskara Rao and another ... Respondents

DATE OF JUDGMENT PRONOUNCED: 03.04.2018

SUBMITTED FOR APPROVAL:

HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

- 
- 1 Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/ No
 - 2 Whether the copies of judgment may be marked to Law Reports/ Journals Yes/ No
 - 3 Whether Their Ladyship/ Lordship wish to see the fair copy of the Judgment? Yes/ No