

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD  
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH  
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**A.S.No.828 of 2017**

Between:

Kuturu Rajeshwar and others

..... Appellants

And

Nayamtabad Ramkishan and another.

....Respondents

DATE OF JUDGMENT PRONOUNCED: 28-09-2018

SUBMITTED FOR APPROVAL:

**THE HON' BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**

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

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GUDISEVA SHYAM PRASAD, J

**HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD****APPEAL SUIT No.828 of 2017****JUDGMENT :**

This Appeal Suit is directed against the order dated 19.07.2017 passed in E.A.No.21 of 2012 in E.P.No.22 of 2012 on the file of Principal District Judge, Nizamabad.

The brief facts of the appeal are that the appellants/third parties filed E.A.No.21 of 2012 in E.P.No.22 of 2012 under Order XXI Rule 58 and Section 151 of C.P.C., before the Executing Court for raising attachment of petition schedule property, house bearing Municipal Nos.2-6-97 and 2-6-98, situated at Weekly Bazar, Nizamabad.

The appellants claim that they are the absolute owners and possessors of the petition schedule property. They have purchased the said property by a registered sale deed dated 03.11.2011, for a consideration of Rs.58 lakhs, from the 2<sup>nd</sup> respondent herein, and they have been in possession and enjoyment of the said property from the date of purchase.

Originally, the 1<sup>st</sup> respondent filed a suit against the 2<sup>nd</sup> respondent in O.S.No.14 of 2010 for recovery of money. The suit

was decreed for a sum of Rs.11,96,440/- with interest @ 18% against the 2<sup>nd</sup> respondent.

The 1<sup>st</sup> respondent filed E.P for execution of the decree by attachment of the property of the 2<sup>nd</sup> respondent, which the 2<sup>nd</sup> respondent already offered as a security in I.A.No.2978 of 2010 filed in the suit O.S.No.14 of 2010. The Court ordered conditional attachment in the said interlocutory application, wherein the 1<sup>st</sup> respondent has furnished security by way of giving an undertaking .

In the interlocutory application I.A.No.2978 of 2010 filed for attachment of petition schedule property, one of the appellants got examined as PW.1 before the Executing Court. Ex.P.1 – Certified copy of registered Sale Deed dated 03.11.2010, Ex.P.2 – Certified copy of Report of Bailiff dated 18.10.2010, Ex.P.3 – Certified copy of Panchanama made by the Bailiff, Ex.P.4 – Tom-tom Receipt dated 18.12.2010, Ex.P.5 – Notice dated 23.10.2010 issued to the general public, and Ex.P.6 – Copy of warrant of attachment are marked in his evidence.

On behalf of respondents, RWs.1 and 2 are examined and Ex.R.1 – Certified copy of Undertaking given in O.S.No.14 of 2010 and Ex.R.2 – Publication made in Eenadu Daily Newspaper dated 21.07.2010 are marked.

The trial Court, in para-12 of its judgment in O.S.No.14 of 2010, observed that the 1<sup>st</sup> respondent has given an undertaking dated 04.08.2010 to the effect that she would not alienate, transfer or sell the suit schedule property till the disposal of the suit. But the 1<sup>st</sup> respondent fraudulently transferred the property on 03.11.2010 by executing a registered Sale Deed in favour of the third parties/appellants herein.

The Executing Court, on consideration of the evidence, came to the conclusion that the transfer of property is a fraudulent transaction under Section 53 of the Transfer of Property Act. The Executing Court further observed that though there was no attachment on the date of purchasing the property by the appellants, they have knowledge about the litigation as a public notice was issued by respondent No.1 stating that the Court issued an attachment order on 20.07.2010, which is prior to purchase of the property by the appellants. On these grounds, the Executing Court came to the conclusion that the transfer made by respondent No.2 was a fraudulent transfer and dismissed the claim petition.

On a perusal of the order passed by the Executing Court, as per Ex.R.1 – CC of Undertaking given in O.S.No.14 of 2010 that the undertaking was given by the 1<sup>st</sup> respondent, who is the defendant before the trial Court. She stated in her undertaking that

the plaintiff has filed I.A.No.1864 of 2010 for attachment of her house property in Nizamabad before judgment.

The defendant filed her counter in the said application stating that she created charge over her property by way of mortgage to several persons. To clear off those debts, the defendant intended to sell her house and got published a notice in 'Saakshi' Newspaper calling for objections from the public for intended sale of her property. Since the plaintiff got issued a legal notice, and filed the above suit and interlocutory application, she dropped her idea of selling the house, as it amounts to *lis pendens*, if she sells her property during the pendency of case.

She further stated in para-5 of her undertaking that as per the directions of the Court, she has given an undertaking to the effect that she would not alienate, transfer or sell her house bearing Nos.2-6-97 and 2-6-98, to any third party till O.S.No.14 of 2010 is disposed of. The said undertaking was marked as Ex.R.1 in the evidence of RW.1. The undertaking was signed on 04.08.2010.

Learned counsel for the appellants submitted that the property was attached on 18.12.2010 as per the orders in I.A.No.2978 of 2010, by which date the property was sold by the 2<sup>nd</sup> respondent in favor of the appellants under registered Sale Deed dated 03.11.2010.

Now the question is—

- (1) Whether the appellants purchased the property during the pendency of attachment before judgment before the trial Court?
- (2) Whether the undertaking given by respondent No.2 amounts attachment before judgment?
- (3) Whether there was an attachment before judgment under Order XXXVIII Rule 5 of C.P.C., during the pendency of the suit?

Point No.1 :

The contention of the learned counsel for the appellants is that by the date of purchase of the property, there was no attachment under Order XXXVIII Rule 5 of C.P.C. The Executing Court observed that the date of attachment was on 18.12.2010, and the sale was made on 03.11.2010 i.e., prior to the attachment.

Learned counsel for the appellants placed reliance on various decisions for the proposition that the undertaking given by the 1<sup>st</sup> respondent does not amount to attachment before judgment.

The order under challenge in this appeal is the dismissal of E.A.No.21 of 2012. The said Execution Application is filed by the 3<sup>rd</sup> party/appellants for raising the attachment ordered in E.P.No.22 of 2012. The appellants contend that they have purchased the suit schedule property from respondent No.2 under a registered Sale Deed dated 03.11.2010 and by the date of sale of the property by

respondent No.2, there was no attachment order passed in the suit, whereas the attachment order was passed in I.A.No.2978 of 2010 on 18.12.2010. The documents under Exs.P.1 to P.6 filed by the plaintiff before the trial Court were subsequent to the execution of the sale deed. The appellants relied on Ex.P.1, the Certified copy of registered Sale Deed dated 03.11.2010, basing on which they claimed title over the suit schedule property. They placed reliance on Ex.P.2 – Certified copy of Report of Bailiff to show that the order of attachment in I.A.No.2978 of 2010 to furnish security was passed on 18.10.2010. The report of bailiff reveals that on identification of the property in the presence of panch witnesses at the instance of the petitioner, attachment was effected on 18.10.2010. The finding of the trial Court in the Execution Application is that the property was attached on 18.10.2010. The property was sold on 03.11.2010, which is prior to the attachment. Ex.P.3 – Certified copy of Panchanama supports the date of attachment. They have also relied on Ex.P.4 the Tom-tom Receipt effected for attachment of the property on 18.10.2010. Ex.P.5 is the Notice dated 23.10.2010 issued to the general public calling for objections for sale of the property. Ex.P.6 – Copy of warrant of attachment.

As rightly contended by the learned counsel for the appellants, the documents under Exs.P.2 to P.6 are all subsequent

to Ex.P.1 – registered Sale Deed dated 03.11.2010. Therefore, in the light of the findings of the trial Court, it can safely be concluded that the attachment order was passed subsequent to the purchase of the property by the appellants.

The contention of respondent No.1 is that as per Ex.R.1 – Certified copy of Undertaking dated 04.08.2010, respondent No.2 has given an undertaking to the effect that she will not alienate, transfer or sell her house to any third party till disposal of the suit O.S.No.14 of 2010. Respondent No.1 has also filed Ex.R.2 – Copy of Public Notice dated 21.07.2010 informing the general public that he filed a suit for recovery of money and sought for attachment before judgment of the petition schedule property in I.A.No.1864 of 2010 and the Court ordered for conditional attachment of the said house.

Learned counsel for respondent No.1 placing reliance on Exs.R.1 and R.2 submitted that the attachment before judgment was ordered in the petition even on 12.07.2010 i.e., much prior to the alleged sale.

The contention of the learned counsel for respondent No.1 clearly reveals that in anticipation of sale of the property, a Public Notice was issued under Ex.R.2, immediately after the conditional attachment was ordered. Therefore, the contention of the

appellants that there was no attachment of the property before judgment cannot be accepted for the reason that Ex.R.1 was an undertaking given by respondent No.2 to the Court not to sell the property. Having given the said undertaking, respondent No.2 has chosen to sell the property to the third party/appellants thereby violating the said undertaking. In spite of Public Notice issued under Ex.R.2, the appellants have purchased the property. The appellants also must have got knowledge about the subsistence of attachment of property by the date of sale.

Learned counsel for the appellants placing reliance on catena of decisions submitted that the undertaking given by respondent No.2 to the Court does not amount to attachment under Order XXXVIII Rule 5 of C.P.C. If the undertaking given to the Court is violated, the Court has to take contempt proceedings against the defendant, but the rights of third party bonafide purchasers cannot be affected.

At this juncture, it is appropriate to refer to the provision under Order XXXVIII Rule 5 of C.P.C., which reads as under:

**“Order XXXVIII – ARREST AND ATTACHMENT  
BEFORE JUDGMENT:**

**5. Where defendant may be called upon to furnish  
security for production of property:-**

(1) Where at any stage of a suit, the Court is satisfied by affidavit or otherwise, that the deft. with intent to obstruct or

delay the execution of any decree that may be passed against him --

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the deft., within a time to be fixed by it, either to furnish security, in such sum as may be specified by the order, to produce & place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear & show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.”

It has been interpreted in a judgment of this Court and the same thus relied upon by the learned counsel for the appellants in the case of Y. KESAVULU v. T. KALAVATHI<sup>1</sup>. In this case, an exparte interim order was granted directing the defendant to furnish security or show cause why he should not furnish security as directed within 48 hours after receipt of notice and why the property shall not be attached on failure of the defendant to furnish security.

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<sup>1</sup> 2016 (6) ALD 286

Before adverting further, to decide whether an undertaking given in an interlocutory application filed under Order XXXVIII Rule 5 of C.P.C. can be considered as attachment before judgment or not, the object of Order XXXVIII Rule 5 of C.P.C. has to be looked into.

In para-4 of the judgment in Y. KESAVULU's case (supra), the object of Order XXXVIII Rule 5 of C.P.C. has been clearly explained, which reads as under:

“..... The undertaking memo and the affidavit of the defendant cannot be considered and accepted as they are against the principles of natural justice. Order XXXVIII Rule 5 of the Code does not contemplate and does not permit the defendant to give an undertaking in the petition filed for attachment before judgment. The said provision only contemplates for ordering attachment before judgment of the petition schedule property and prescribes the procedure in that regard. The said provision is enacted with an object to give inviolability to the Court decrees and avoid unnecessary and further complications and to enable the Decree Holder to enjoy the fruits of the decree that may ultimately be passed. Acceptance of undertaking in a petition for attachment before judgment is against law. The defendant has failed to comply with the interim order whereby she was directed to either furnish security or show cause as to why she should not furnish the security. On failure of the defendant to comply with the said orders, the interim attachment order has become operative. The defendant is still making serious attempts to sell the schedule property. There are no merits in the request of the defendant to accept her undertaking affidavit and raise the interim order of

attachment. The Court below grossly erred in accepting the undertaking given by the defendant and raising the interim order, which has become operative.”

The above decision was rendered in a different situation. In the above decision, the plaintiff filed a suit for recovery of money along with an application under Order XXXVIII Rule 5 of C.P.C., requesting to order attachment before judgment of the property of the defendant, a residential house. The trial Court granted *exparte* interim order directing the defendant to furnish security and show cause why she should not furnish security within 48 hours after receipt of the notice in the said application. The defendant filed his counter in the application filed under Order XXXVIII Rule 5 of C.P.C. and also filed another application to raise the interim order of attachment and dismissed the application filed by the plaintiff for attachment before judgment. The trial Court vide separate orders disposed of both the applications, allowing the application filed by the defendant accepting the undertaking given by her and raised the attachment before judgment. Aggrieved by that, the plaintiff filed two revision petitions before this Court. This Court, while observing about the object of filing a petition under Order XXXVIII Rule 5 of C.P.C. in para-4 of the order as referred above, held in para-14 of the order as follows:

“In the result, the CRP.no.4915 of 2015 is allowed and the order of the Court below in IA.no.19 of 2014 accepting the

undertaking of the defendant is set aside. As a sequel, the CRP.no.4978 of 2015 is allowed and the order impugned therein is set aside; and, keeping in view this Courts finding that sufficient case as required under facts and in law is made out by the plaintiff for ordering attachment before judgment of the application schedule property, IA.no.17 of 2014 is remitted to the trial court subject to the following directions: The trial Court pursuant to the instant orders of this court shall now fix a reasonable time in its discretion and give a fresh opportunity to the defendant by directing the defendant to furnish, within such fixed reasonable time, any immovable property security or such security for the suit amount to the satisfaction of the trial court. It is needless to say that on failure of the defendant to avail the said opportunity to furnish the security within the time fixed by the trial Court, the trial Court shall pass final orders of attachment before judgment as per procedure. It is made clear that till the disposal of the application afresh by the trial court as directed in these orders there shall be in force the interim order of attachment before judgment of the petition schedule property. There shall be no order as to costs.”

The facts in the above case are totally different from the facts of the present case. In the instant case, the plaintiff filed a suit for recovery of money along with an interlocutory application seeking attachment before judgment of the property under Order XXXVIII Rule 5 of C.P.C. The trial Court passed a conditional attachment order directing the defendant to furnish security by way of an undertaking. The defendant filed an undertaking not to sell the property sought to be attached under Order XXXVIII Rule 5 of C.P.C. till disposal of the suit for not attaching the property. The

defendant gave undertaking not to sell the property during pendency of the suit. Thereafter he sold the property to the third party in violation of the undertaking given by her to the Court. The defendant has quietly sold the property to the third party/appellants herein and now contends that there was no attachment by the date of sale of the property to the third party/appellants. It is in gross violation of the undertaking given by the defendant. The very object of Order XXXVIII Rule 5 of C.P.C., as stated above in para-4 of the above judgment, was to prevent defendant from defeating the realisation of the decree that may ultimately be passed in favour of the plaintiff. It is to prevent the defendant, either by attempting to dispose of, or remove from the jurisdiction of the Court, his movables. The scheme of Order XXXVIII of C.P.C. and the use of the words 'obstruct' or 'delay the execution of any decree that may be passed against him' in Rule 5 thereof make it clear that before exercising the power under the said rule, the Court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant.

In the instant case, the trial Court has passed a decree against the defendant. The defendant got benefitted by giving an undertaking to the Court that she would not sell the property and basing on the said undertaking, the interlocutory application was closed. The defendant, admittedly, derived benefit out of the

undertaking given by her to the Court that she would not sell the property. But, in violation of the said undertaking, subsequently the defendant had sold the property to the third party/appellants, which is nothing but a fraudulent act on the part of the 2<sup>nd</sup> defendant. No doubt, the Court can proceed against the 2<sup>nd</sup> defendant for violating the undertaking given to it. As the Court has recorded the undertaking and closed the attachment petition, the plaintiff could not proceed against the defendant in the suit keeping in view the undertaking given by her that she would not alienate the property, which is sought to be attached under Order XXXVIII Rule 5 of C.P.C. If the undertaking was not given by the defendant, the petition schedule property would have been attached and some final orders would have been passed by the trial Court at the end of the trial and the property ought to have been brought for sale during execution of the decree. The defendant having given an undertaking stating that she would not sell the property till disposal of the suit and later in violation of the said undertaking, now turning round and saying that the undertaking given by her cannot be considered as attachment before judgment, that she sold the property as there was no attachment before judgment. The third party petitioner's rights cannot be interfered with as he was a bonafide purchaser.

In a decision rendered by this Court in TUMMURI SURYANARAYANA v. JAGATHA SESHAGIRI RAO<sup>2</sup>, in a suit filed by the plaintiff based on a mortgage, the defendant gave an undertaking not to alienate the suit property. But, contrary to the said undertaking, he mortgaged the suit property to the plaintiff in the present suit, who was aware of the earlier proceedings. The 2<sup>nd</sup> defendant himself in the execution proceedings of the decree against him purchased the suit property. The trial Court held that the suit mortgaged was not valid being contrary to the undertaking given by the mortgagor – first defendant. This Court held that the Court below erred in decreeing the mortgage suit on the ground that there is no proof that the Court has accepted the undertaking given by the mortgagor – first defendant holding that the undertaking amounts to attachment within the meaning of Section 64 of C.P.C. In para-39 of the above decision, this Court held as under:

“39. From the above it is seen that while the first application is for attachment of the rice mill before judgment, the second application was filed seeking injunction restraining D1, which is more effective than the attachment before judgment sought for earlier. But, the Court might have felt that there is no need to issue an injunction order in the light of the second undertaking given by D1, more so after he suffered a decree in the trial Court and during the pendency of the appeal preferred by him. Even assuming for a moment that the suit filed by D2 is for an unspecified debt, the second

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<sup>2</sup> 2000 (5) ALD 400

undertaking was given by D1 after he suffered decree. Hence, it cannot be said that D1 and the persons claiming under him are not bound by the undertaking given by him, on an imaginary ground that the Court might not have accepted the undertakings and might have dismissed the application that was not even the case of the plaintiff himself. Further the learned Judge has forgotten that these undertakings were given to the Court not to the party and some sanctity should be given to the proceedings in adjudication of a dispute in a competent Court and they cannot be thrown as a waste paper. Hence, I hold that the undertakings given by D1 operates as an order of attachment under Section 64 CPC and any private alienation of the property subsequent to the undertaking cannot be sustained in law.”

From the above decision, it is clear that the undertaking given by the defendant operates as an order of attachment under Section 64 C.P.C., and any private alienation of the property subsequent to the said undertaking cannot be sustained in law.

In the instant case, respondent No.2 made a private alienation to the appellants during the pendency of the suit when there was an attachment before judgment was subsisting. Section 64 of C.P.C., which states that the private alienation of the property after attachment to be void reads as under:

**“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.”

The findings in the above decision makes it clear that the undertaking given by the defendant operates as an order of attachment under Section 64 of Cr.P.C., and any private alienation of the property subsequent to the undertaking cannot be sustained in law.

No doubt, the above decision was rendered in respect of a mortgage suit, but in the instant case, the property sought to be attached was to avoid frustration of the decree by way of defeating and delaying the decree to be passed in favour of the plaintiff.

Learned counsel for respondent No.1 relied on a decision rendered by the Hon’ble Apex Court in WESTERN PRESS PVT. LTD., MUMBAI v. THE CUSTODIAN AND OTHERS<sup>3</sup>. Para-14 of the said judgment, which is relevant, reads as under:

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<sup>3</sup> AIR 2001 SC 450

“14. That apart, the provisions contained in Section 145 CPC also would enure to the benefit of the Court as well as the Custodian to proceed against the appellant in enforcement of the undertaking given to the Court and there are no merits in the contentions sought to be urged to the contrary.”

Learned counsel for respondent No.1 also relied on a decision rendered by the Kerala High Court in *CHERUKUTTY Vs. SUBRAMA SASTRIGAL*<sup>4</sup>. Para-11 of the said judgment reads as under:

“11. The learned Subordinate Judge held that the effect of filing an undertaking amounts to an attachment itself. The court accepted the undertaking and on that basis the petition for attachment was dismissed. The judgment debtor had undertaken in Court not to alienate or transfer possession of the properties to any other person. We see no illegality in the finding of the lower Court that the transfer in violation of such an undertaking will not bind the decree holder, even if the transfer is true and valid for other purpose. The order on the basis of the undertaking was passed on 21.07.1977. The claim of tenancy was raised only on 13.07.1978. Under the circumstances, we confirm the finding of the lower Court that the relief prayed for by the appellant is only to be disallowed. There is no merit in this appeal and it is accordingly dismissed.”

Learned counsel for the appellants mainly submitted that the undertaking given by respondent No.2, if violated, it may amounts to contempt of Court, but it does not amount to attachment of the property under Order XXXVIII Rule 5 of C.P.C. Therefore,

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<sup>4</sup> LAWS (KER) 1987 9 31

dismissing the application filed by the appellants is liable to set aside.

The submissions made by the learned counsel for the appellants may be technically having some force, but in its letter and spirit, the defendant, having given an undertaking, had deliberately sold the property to third party/appellants in violation of the undertaking given to the Court and also depriving the plaintiff to seek remedy under Order XXXVIII Rule 5 of C.P.C. by grossly defeating the said provision, which is meant to protect the interest of the decree holder. The apprehension of respondent No.1 that respondent No.2 may dispose of the property sought to be attached under Order XXXVIII Rule 5 of C.P.C. has become true. The defendant had sold the property to the third party/appellants immediately after giving undertaking to the Court, thereby she has defeated the very purpose of the provision under Order XXXVIII Rule 5 of C.P.C. Therefore, this is not a fit case where the orders of the Executing Court can be interfered with. The appellants may workout their remedies in respect of the alienation of the property made by respondent No.2.

In the light of the above decision and in the facts and circumstances of the case, there are no reasons to interfere with the

findings of the Executing Court dismissing the petition filed by the appellants in E.A.No.21 of 2012.

In the result, the appeal suit is dismissed confirming the order dated 19.07.2017 in E.A.No.21 of 2012 in E.P.No.22 of 2012 in O.S.No.14 of 2010.

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GUDISEVA SHYAM PRASAD, J

28.09.2018.

NOTE: L.R. Copy be marked.  
(B/O)  
Msr



HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

APPEAL SUIT No.828 of 2017



28.09.2018  
Msr