

Application No.7466 of 2018
in
A.No.3338 of 2017

M.GOVINDARAJ, J.

The present application is filed seeking a direction to 4th respondent/Sub Registrar, Ponneri to register the sale deed submitted on 06.06.2018 bearing pending Registration No.P/Ponneri/111/2018, or in the alternative, raise the order of attachment dated 29.08.2017 passed in Application No.3338 of 2017 in respect of the schedule property mentioned in the judges summons.

2. The 1st respondent Finance Company in the above application originally filed an application in A.No.3338 of 2017 for attachment of the property pending arbitration, wherein, this Court, by an order dated 29.08.2017, passed the following order;

'5. In view of the above circumstances, I am satisfied that the prayer sought for by the applicant is warranted. Therefore, there shall be an order of attachment as prayed for in the judges summons and a copy of the attachment order be transmitted through the Sub Judge, Ponneri and the same may be hand delivered to the applicant for transmission. Needless to mention, the order of attachment is subject to the result of the arbitration stated to be pending as between the parties.

6. In view of the above, nothing further survives

in this application and the same stands closed. The parties are free to take such action, as they may desire hereafter, in accordance with law.'

3. Thereafter, the applicant filed an application to restore the Application No.3338 of 2017 that was already closed on 29.8.2017. The said application was ordered on 11.1.2018 and the matter was taken up for hearing. Thereafter, the application filed by the present applicant to raise the order of attachment dated 29.8.2017 passed in A.No.3338 of 2017 was taken up by this Court on 15.2.2018 and this Court passed the following order;

'4. The sole objection to the attachment ordered on 29.08.2017 is to the effect that the applicant, a third party to the transaction between the parties in A.No.3338 of 2017, holds a pre-existing charge over the schedule property.

5. It is seen that the attachment ordered on 29.08.2017 is itself only a second charge upon the property as per paragraph 14 of the affidavit filed in A.No.3338 of 2017 to the following effect:

'14.. I am advised to state that even in the event of attachment of the property mortgaged to the M/s.SLO Industry Ltd., the applicant will get only second charge over the said property that too only on surplus/residue amount if at all available after adjustment of the sale proceeds towards the amount due to M/s.SLO Industry Ltd. Therefore the applicant is constrained to approach this Hon'ble

Court with the present application for attachment of schedule property.....'

6. That apart, the provisions of Order 38 Rule 10 of the Code of Civil Procedure read thus:

'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.'

7. Thus, in terms of Order 38 Rule 10 extracted above, the attachment of the schedule property ordered on 29.08.2017 will be subject to all pre-existing charges as on the date of order.

8. In the light of the above, there is no necessity to lift the attachment ordered except to record the position that the same will be subject to all pre-existing charges.

9. The application is ordered in the above terms.'

4. According to the applicant, this Court, by order dated 15.2.2018 had held that attachments before judgment passed in A.No.3338 of 2017 would be subject to the prior mortgage executed in favour of the applicant by 2nd and 3rd respondents.

5. Pursuant to the same, the applicant submitted the sale deed to the 4th respondent, Sub Registrar, Ponneri for registration on 6.6.2018. The Sub Registrar has not registered the sale deed on the ground that there is an order of attachment of the property passed by this Court. Despite the representations of the applicant dated 30.6.2018 and 17.7.2018, the 4th respondent Sub Registrar refused to register the document and release the sale deed and therefore, the applicant preferred the present application seeking a direction to the 4th respondent/Sub Registrar, Ponneri to register the sale deed submitted on 06.06.2018 bearing pending Registration No.P/Ponneri/111/2018, or in the alternative, raise the order of attachment dated 29.08.2017.

6. He would rely on the judgment of the Honourable Supreme Court reported in **(1990) 3 Supreme Court Cases 291 (Vannarakkal kallalathil Sreedharan Vs. Chandramaath Balakrishnan and another)** and the judgment of the Division Bench of this Court reported in **1996 LW page 1 (S.U.S.Davey Sons Vs. P.M. Narayanaswami and another)**

7. According to the applicant, the right, title and interest

conveyed to a third party through a prior mortgage with power of sale will not be affected by a subsequent order or attachment against the mortgagor. The Honourable Division Bench of this Court in **1996 LW page 1 (S.U.S.Davey Sons Vs. P.M. Narayanaswami and another)**, in paragraph 6 has held as follows;

6.....

In fact, S.69 is one of those rare instances where a person, who is not the owner of the property, could convey the right, title and interest of a third party mortgagor. The mortgagee gets a power to sell the mortgagor's interest in the property along with his interest and while exercising such power of sale, as observed by the Supreme Court he is not acting under the mortgagor or as an agent of the mortgagor. The attachment order will have therefore no effect on the power of sale exercised by the mortgagee..'

8. Relying on the judgment of the Honourable Supreme Court in **(1990) 3 Supreme Court Cases 291 (Vannarakkal kallalathil Sreedharan Vs. Chandramaath Balakrishnan and another)**, he would contend that an order of attachment intended to protect the attaching creditor will not take away the contractual obligations, which was existing prior to the attachment. The relevant portion is extracted as under;

'9. In our opinion the view taken by the High Courts of Madras, Bombay, Calcutta and Travancore-Cochin in the aforesaid cases appears to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to the

ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Section 64 CPC no doubt was intended to protect the attaching creditor, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. We cannot, therefore, agree with the view taken by the Punjab and Haryana High Court in Mohinder Singh case.

9. This Court by its order dated 15.2.2018 has considered all these contentions and passed final orders in the application that the order of attachment need not be lifted and the same will be subject to all pre existing charges. Once a final order is passed for the same relief, the Court becomes *functus officio*, and cannot revisit the order on a fresh application. It is always open to the parties to take recourse through review, modification or clarification or even by filing

appeal, but not by fresh application in a concluded matter before the same Court. Hence the application is not maintainable.

10. In such a view of the matter, the prayer sought for in this application, i.e., to raise the order of attachment dated 29.8.2017 has already been disposed of by an order of this Court dated 15.2.2018 and the same cannot be entertained now.

11. In an application under Section 9 of the Act, the direction sought for by a third party to direct the Sub Registrar to register the document is beyond the scope of arbitration as well as the prayer sought for in the main application. Even assuming that this forum has powers to grant interim protection to a third party and if the present application is allowed, that will indirectly set aside the order passed by this Court on 15.2.2018. Such a relief cannot be granted by this Court.

12. In view of the same, the A.No.7466 of 2018 stands dismissed. No costs.

msr

03.06.2019

M. GOVINDARAJ, J.

msr



PreDELIVERY order in
Application No.7466 of 2018
in
A.No.3338 of 2017

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03.06.2019

**PRE-DELIVERY JUDGMENT IN A.NO.7466 OF 2018 IN
A.NO.3338 OF 2017**

TO

THE HONOURABLE MR. JUSTICE M.GOVINDARAJ

Most respectfully submitted

M.Sasirekha,
PA.



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