

(2007) 03 KAR CK 0082
In the Karnataka High Court
Case No : Regular First Appeal No. 88 of 2002

Sri D.L. Sridhar Setty

APPELLANT

Vs

Sri C.R. Chandramohan and Industrial Credit and
Development Syndicate Ltd.

RESPONDENT

Date of Decision : 27-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58

Citation : AIR 2008 Kar 51 : (2008) ILR (Kar) 591

Hon'ble Judges : K. Ramanna, J

Bench : Single Bench

Advocate : S. Shekarappa, for the Appellant; K.S. Vyasa Rao, for R2, for the Respondent

Final Decision : Allowed

Judgement

K. Ramanna, J.—This appeal is filed against the order dated 15.9.2001 passed by the Principal civil Judge (Sr. Dn.) Davangere in Mis. Case No. 213/1993 whereunder the learned Prl. Civil Judge dismissed the Mis. Case filed under Order 21 Rule 58 of CPC. for raising attachment made in respect of the schedule property in Execution Petition No. 520/1989.

2. The facts of the case, in brief, are as follows. Respondent No. 2 herein who was respondent No. 3 before the trial court had filed a suit O.S. No. 135/1987 against sri Murugendrappa and Sri C.R. Chandramohan-respondent No. 1 herein Respondent No. 2 herein had advanced loan in favour of respondent No. 1 Chandramohan and he being a hire purchaser and sri Murugendrappa and sri M.V. Srinivas stood as guarantors in executing a hire purchase agreement in respect of vehicle No. MEG 8910 in favour of respondent No. 2 i.e. plaintiff in O.S. No. 135/1987. Therefore respondent No. 2 became the legal owner of the vehicle and possession was delivered to Sri C.R. Chandramohan, arrayed as defendant No. 1 in the said suit and accordingly the said suit was filed by the second respondent-plaintiff requesting the Court to pass a decree for Rs.

50,000/- with future interest at 141 and the said suit came to be decreed in favour of respondent No. 2. Accordingly respondent No. 2 filed Execution Petition No. 520/1989 on the file of the civil Judge, udupi. Subsequently the decree came to be transferred to the court of civil Judge (Sr. Dn.), Davangere. When the said execution petition was pending, the appellant herein is said to have purchased the property from H.K. Mallikarjunappa who is not a party before this court, under a registered sale deed dated 15.11.1991 for a valuable consideration of Rs. 98,000/-. Sri Mallikarjunappa had purchased the property from Murugendrappa, who is not a party before this court, on 5.12.1990 under a registered sale deed for valuable consideration. The said Mallikarjunappa had delivered the original sale deed dated 5.12.1990 to the petitioner namely Sri D.L. Sridhar. The said Mallikarjunappa initially entered into a registered agreement of sale with Chandramohan in the suit on 19.4.1990 and thereafter executed a sale deed on 5.12.1990. Before the sale deed came to be executed in favour of H.M. Mallikarjunappa, the property in question was attached in Ex. P. No. 520/1989 but the sale deed came to be executed on 5.12.1990. Therefore the appellant herein filed a petition under Order 21 Rule 58 CPC. and the same came to be numbered as Misc. No. 213/93 before the executing court in Ex. P. No. 520/1989 to raise attachment. The learned Civil Judge (Sr. Dn.) held an enquiry, recorded the evidence of the appellant and his sons and marked in all 16 documents produced by him and after considering the evidence dismissed Mis. P. No. 213/1993. Against this order of dismissal, the appellant a subsequent purchaser of the property has come up with this appeal.

3. Heard the arguments of the learned Counsel for the appellant and learned Advocate for the respondents.

4. It is contended by the learned Counsel for the appellant that he being a lawful purchaser of the property from one H. Mallikarjunappa who had purchased the property from Murugendrappa, the property in question is an immovable property. The appellant is not a surety to the main borrower namely, Chandramohan. He had purchased the vehicle in question from H. Mallikarjunappa under a registered sale deed. He being a lawful purchaser, he has rightly filed the petition Mis. No. 213/1993 to raise attachment made in respect of the schedule property in Ex. P. 520/1989. The trial Court utterly failed to consider the fact that before attachment of the property in question, an agreement was entered into by Murugendrappa with Mallikarjunappa. Murugendrappa and M.V. Srinivas stood guarantors to the hire purchase agreement which was executed by Chandramohan in favour of respondent No. 2 and respondent No. 2 herein obtained a decree in O.S. No. 135/87 against Chandramohan, the main borrower and Murugendrappa the guarantor. Thereafter the respondent No. 2 herein got the property in question attached in Ex. P. 520/1989. It is argued that the appellant herein is a second purchaser of the property in question. He purchased the property under a registered sale deed dated 15.11.1991. Therefore if the property was agreed to be sold under a registered agreement by Chandramohan in favour of Mallikarjunappa, the

property in question could not be attached. Therefore even if the property was attached in execution petition by the decree-holder respondent No. 2, that the registered agreement executed by Chandramohan in favour of Mallikarjunappa prevails over it. Therefore the appellant being a second purchaser became absolute owner and the attachment, if any, made in the execution petition filed by the respondent No. 2 ought to have been raised. It is argued that the remedy available for respondent No. 2 to recover the amount due is to sue the main borrower and the guarantors only. Hence the judgment and order passed by the learned civil Judge (Sr. Dn.) in Misc. No. 213/93 is erroneous, perverse and illegal and incorrect and is liable to be set aside.

5. On the other hand, learned Counsel for respondent No. 2 contended that respondent No. 2 is a decree holder and the property attached in the execution petition was for recovery of the amount due on the basis of the judgment and decree passed in O.S. No. 135/1987. Therefore in order to defraud the rights of respondent No. 2, the judgment debtor No. 2 Murugendrappa is said to have executed a registered agreement of sale before attachment and subsequently sale deed said to have been executed is illegal and therefore any sale deed executed during the pendency of the execution petition is null and void. Therefore the trial court rightly dismissed the Mis. Petition filed under order 21 Rule 58.

6. Having heard the arguments of the learned Counsel for both parties, now I proceed to see whether the judgment and order of dismissal passed by the Civil Judge (Sr. DN) in Mis. P. 213/1993 is perverse, incorrect and illegal.

7. It is an undisputed fact that the respondent No. 2 being a owner of motor vehicle No. MEG 8910 entered into a hire purchase agreement with respondent No. 1 and one Murugandrappa and M.V. srinivas stood as guarantors. The suit O.S. No. 135/87 filed by him came to be decreed. No doubt the Execution petition was filed before udupi Court and it was got transferred to the court of the Civil Judge (Sr. DN), Davangere and an order of attachment was passed in respect of the petition schedule property in the said Ex. P. 920/89. Thereafter the appellant herein filed Miscellaneous Petition No. 213/93 under Order 21 Rule 58 of CPC. for raising attachment made in respect of the schedule property in Execution 520/1989. As could be seen from the records it is clear that when the Execution Petition was pending, Mallikarjunappa, son of channabasappa, one of the judgment debtors in EX. P. 520/89 is said to have sold the property in question to the Appellant-petitioner-D.L. Sridhar for a sum of Rs. 98,000/-. So on the basis of the sale deed, khata in respect of the petition schedule property i.e. premises bearing No. 886, 1st Division, Doddabeedi, Davangere came to be mutated in his favour. It is also a fact that Mallikarjunappa had purchased the property from Murugandrappa under a registered sale deed dated 5.12.1990 and it is also a fact that Murugendrappa entered into an agreement of sale with Mallikarjunappa on 19.4.1990 agreeing to sell the property for a sum of Rs. 60,000/- as par Ex.P-10. Ex. P-9 sale deed came to be executed by

Murugandrappa and his four sons in favour of Mallikarjunappa. This fact has not been seriously disputed but the property in question was attached in Ex. No. 520/1989 on 17.12.1990. That registered agreement of sale was entered into on 5.12.1990 much prior to the attachment of the immovable property of Murugendrappa. Learned Counsel for the appellant has rightly relied on the decision rendered by the Hon"ble Apex Court in the case of Vannarakkal Kallalathil Sreedharan Vs. Chandramaath Balakrishnan and Another, wherein it has been held as follows:

Agreement of sale of land in favour of a party (appellant) entered into prior to attachment of the land in execution of decree obtained by a third party but sale pursuant to the agreement taking place subsequent to the attachment-Held, sale will prevail over the attachment.

It is further held that:

Contractual obligation created by the pre-attachment agreement of sale is in respect of ownership of the land while the attachment is only of right, title and interest of the judgment debtor. Under a contract of sale entered into before attachment the conveyance after attachment in pursuance of the contract passes on good title in spite of the attachment. 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, though Section 64 CPC. 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.

perhaps learned Counsel for the respondents has relied on a decision rendered by the Orissa High Court in the case of Rushi Mahakur Vs. Dibya Shankar Padhan and Another, wherein it has been held as follows:

Alienation of immovable property after attachment-it is void-Application by purchaser under Order 21, Rule 58 is not maintainable. An alienation of immovable property made after attachment shall be void against all claims enforceable under the attachment to the same extent as an alienation made after the attachment under a decree.

8. Before attachment of the immovable property of late Murugendrappa, registered agreement of sale was entered into with Mallikarjunappa who purchased the property. Subsequently the property came to be attached by respondent No. 2 in Ex. P. No. 520/1989. Later registered sale deed came to be

executed. subsequently the said property has been purchased by the appellant as per Ex. P-1 on 15.11.1991. Therefore even if the property was attached prior to the execution of the registered sale deed but agreement to sell entered into between Murugendrappa and his sons with the first purchaser Mallikarjunappa prevails. Therefore the appellant being that second purchaser of the petition schedule property who had lawfully purchased the property from its vendor Mallikarjunappa had perfected his title over the property. The trial Court has failed to consider this aspect of the matter and wrongly came to the conclusion that the attachment prevails over the sale deed of the appellant-petitioner. Considering the law laid down by the Apex Court, it could be said that the finding recorded by the trial court in Mis. P. 213/1993 is totally perverse, incorrect and illegal and is liable to be set aside. Accordingly, the appeal deserves to be allowed.

9. A reference could be made to the decision rendered in the case of Lingabhatta @ Thammaiah and Ors. v. Saravana Enterprises and Anr. reported in AIR 2003 KAR 126, wherein it has been held as follows:

Order 21 Rule 30 and Rule 54-Recovery of decretal amount-attachment of property in execution-Property in question had been purchased under registered sale deed for valid consideration when there was no valid attachment order subsisting-Decree Holder cannot proceed against property in question.

10. For the foregoing reasons, the appeal is allowed. The judgment and decree passed by the trial Court in Mis. P. No. 213/1993 is hereby set aside and the petition filed by the appellant-petitioner under Order 21 Rule 58 CPC. is hereby allowed. However, respondent No. 2 being the decree-holder is entitled to execute the decree passed in O.S. No. 135/87 and recover the amount from the main borrower and his co-obligant.