

IN THE HIGH COURT OF KARNATAKA AT
BANGALORE

DATED THIS THE 23RD DAY OF MAY 2012

BEFORE

THE HON'BLE MR. JUSTICE ANAND BYRAREDDY

REGULAR FIRST APPEAL No.580 OF 2003

BETWEEN:

Mr.Jagadish H.Choudhary,
Aged about 23 years,
Son of Hemanth Kumar G.Choudhary,
No.33, Hospital Road,
Bangalore – 560 053,
Represented by his P. A. Holder,
Hemanth Kumar Choudhary.

...APPELLANT

(By Shri. Srinivas, Advocate for Shri. S.K.V. Chalapathy,
Advocate)

AND:

1. Smt. Sheela,
Aged 40 years,
Wife of Sri. Prakash,
Residing at No.53,
Rama Rao Layout,
B.S.K. III Stage,
Bangalore – 560 085.

2. Khimaram,
Son of Late Geesaji Choudhary,
No.14,Rajatha Complex,
A.M.Lane, Chickpet,
Bangalore – 560 053.

...RESPONDENTS

(By Shri. Vinayak. B, Advocate for M/s. Ashok Haranahalli Associates for Respondent No.1
Appeal abated against Respondent No.2 vide order dated 15.11.2006)

This Regular First Appeal is filed under Section 96 of Code of Civil Procedure, 1908, against the order dated 18.3.2003 passed on I.A.No.VIII in O.S.No.16017/2001 on the file of the XXVI Additional City Civil and Sessions Judge, Mayo Hall, Bangalore, rejecting I.A.No.VIII filed under Order XXXVIII Rule 9 read with Section 151 of Code of Civil Procedure, 1908, for raising the order of attachment before judgment.

This Appeal coming on for Hearing, this day, the court delivered the following:

JUDGMENT

Heard the learned counsel for the appellant and the learned counsel for the first respondent, who is the contesting respondent.

2. The brief facts of the case are that the suit was filed by the first respondent herein for recovery of money against the

second respondent. The suit was filed as on 8.8.2001. The same was accompanied by an Interlocutory Application for attachment of property bearing No.76/1, Rajajinagar, Bangalore. Thereafter, the plaintiff had withdrawn that application on 7.11.2001 on the basis of a memo filed. The first respondent then chose to file yet another application under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC' for brevity) on 13.11.2001 seeking attachment of the property, which is said to have been purchased by the appellant herein, under a sale deed dated 4.12.2000. The court below had passed an order of attachment on 22.12.2001. It transpires that the sale deed executed in favour of the present appellant was undervalued and the matter was pending before the competent authority for adjudication as regards the under-valuation of the deed of conveyance. Subsequent to such adjudication, the deed was duly registered as on 9.1.2002 on payment of the applicable stamp duty. Pursuant to which, the appellant approached the court below

seeking that the attachment be raised in view of the property having been purchased by the appellant prior to the date of attachment. The application having been dismissed by the court below, the appellant is before this court.

3. The learned counsel for the appellant would primarily contend that on an objection being raised to the attachment of the property in terms of the provisions under Chapter XXXVIII of the CPC, Rule 8, provides that where any claim is preferred in respect of the property attached before judgment, such claim shall be adjudicated upon in the manner provided for the adjudication of claims to property attached in execution of a decree for the payment of money. And as provided under Order XXI Rule 58, it was necessary for the court below to adjudicate the matter in terms as provided thereunder and the determination of any such claim would have the force of a decree and therefore, the order of the court below, though

passed in a summary fashion, would operate as a decree and hence the present appeal.

Secondly, it is contended that insofar as the court below having held that the sale deed had been executed in favour of the present appellant by the second respondent to defeat the order of attachment and in active collusion with the second respondent, is not preceded by any inquiry and the order proceeds merely on the contention raised by the first respondent at the time of the arguments on the application filed by the appellant.

Further it is pointed out that insofar as the property being available for attachment is also not tenable, since the sale deed in favour of the appellant is dated 4.12.2000 and notwithstanding that the same has been duly registered as on 28.2.2002, the law, as it stands, would enable the appellant to claim that the conveyance would take effect from the date of the deed and not necessarily from the date of registration. In

this regard, reliance is placed on a decision of the apex court in the case of *Gurubax Singh vs. Kartar Singh and others*, ILR 2002 Kar.3449. The learned Counsel would also draw attention to the text of Section 47 of the Registration Act, 1908 to emphasize the fact that the law is plain insofar as the present case is concerned. The sale deed in respect of the property, which was the subject matter of attachment, is dated much prior to the order of attachment in favour of the appellant and notwithstanding that the attachment has been duly registered on a subsequent date, it takes effect from the date of the deed and not from the date of registration and therefore, the order of attachment was not tenable.

4. The learned Counsel for respondent no.1, on the other hand, would contend that the very appeal is not maintainable since the application filed by the appellant was under Order XXXVIII Rule 9 of the CPC, and any order passed thereon

would not be an appellable order and hence, the appeal itself is not maintainable.

It is further contended that in any event, even if the contention of the appellant is to be accepted, it is subject to the appellant establishing the same by way of tendering material evidence which is not forthcoming and the mere say of the appellant that the sale deed, in favour of the appellant in respect of the property, which is the subject matter of attachment, is executed much prior to the date of the order of attachment, cannot be accepted on the face of it. Since there was no inquiry in this regard, it is not open for the appellant to urge this contention in this appeal.

5. On the above contentions, there is no dispute that the order of attachment is passed on an interlocutory application under the provisions of Chapter XXXVIII of the CPC, which generally lays down the procedure to be followed in respect of arrest and attachment before judgment. The appellant herein,

was not a party to the suit, but he had a serious objection to the attachment of the property on the ground that he had purchased the same from respondent no.2. When such was the claim, the matter ought to have been adjudicated as provided under Order XXXVIII Rule 8 CPC, which in turn, would require that the same be adjudicated as provided for under Order XXI Rule 58. This is not forthcoming. Similarly, insofar as the appellant's claim that the property had been purchased under a sale deed dated 4.12.2000 was also to be addressed with reference to material evidence. On the other hand, the court below has proceeded to set aside the application on the basis of the objections filed by the first respondent and has passed a summary order rejecting the application. This, on the face of it, would not be in accordance with the procedure prescribed.

Further, the registration in respect of the deed of conveyance, under which the property is said to have been purchased by the appellant being dated subsequent to the date

of the order of attachment, would not defeat the claim of the appellant if the deed of conveyance had, in fact, been presented for registration much prior to the order of attachment and if indeed the deed of conveyance was dated 4.12.2000, which was much prior to the institution of the suit. This is as provided under Section 47 of the Registration Act and as laid down by the Supreme Court in *Gurubax Singh, supra*, and as incidentally referred to by a Division Bench of this Court in *Veerabhadrapa vs. Jagadish Gowda, ILR 2003 Kar.3042*, as found at Paragraph-10 of the judgment. In that view, the matter would require to be remanded to the trial court for adjudication on the objections raised by the appellant as to the tenability of the attachment of the subject property which is said to have been purchased by the appellant. The allegation of collusion between the second respondent and the appellant herein is a matter which would also require to be established by cogent evidence. Therefore, the court below would have to

adjudicate the matter in terms as provided under the above referred provisions of law.

With that observation, the appeal is allowed. As a matter of form, the order impugned is set aside.

Sd/-
JUDGE

nv