2025 INSC 1364

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2025
(Arising out of SLP (C) No.15592 of 2023)

L.K. PRABHU @ L. KRISHNA PRABHU (DIED) THROUGH LRs … APPELLANT(S)

VERSUS

K.T. MATHEW @ THAMPAN THOMAS & ORS. … RESPONDENT(S)

J U D G M E N T

R. MAHADEVAN, J.

Leave granted.

2. This Civil Appeal has been preferred against the final judgment and order dated 13.02.2023 passed by the High Court of Kerala at Ernakulam[1] in RFA No. 347 of 2009, whereby the High Court disallowed the claim of title raised by the claimant / purchaser (original applicant – L.K. Prabhu @ L. Krishna Prabhu) and remanded the matter to the trial Court to determine the extent, if any, of the

[1] Hereinafter referred to as "the High Court"

purchaser's entitlement towards recovery from the debtor, including any part of genuine sale consideration, with a direction to dispose of the same, within two months from the date of appearance of the parties.

3. The brief facts of the case are as follows:

3.1. The predecessor-in-interest of the appellants, L.K. Prabhu @ L. Krishna Prabhu (original applicant) entered into an agreement for sale on 10.05.2002 with Defendant No. 3, V. Ramananda Prabhu. The agreement proceeds to state that Defendant No. 3 acknowledged his liability of Rs. 17,25,000/- to the original applicant and undertook to discharge the same within three years. It was further stipulated that, in the event of default, Defendant No. 3 would convey 5.100 cents of property with a building situated in Ernakulam Village to the original applicant, for a consideration of Rs. 35 lakhs, upon receipt of the balance sale consideration.

3.2. According to the appellants, endorsements on the reverse of the agreement show the receipt of Rs. 3,00,000/- (by cash) and Rs. 2,50,000/- (by cheque) on 25.06.2004. As Defendant No. 3 failed to honour his commitments, a registered sale deed was executed on 28.06.2004 in favour of the original applicant, upon payment of the balance consideration. Consequently, the original applicant purchased the aforesaid property *vide* Document No. 3752/2004 dated 28.06.2004 on the file of SRO, Ernakulam. Ever since the purchase, the original applicant was in possession and enjoyment of the

property, which has been used as 9 guest houses recognised by the Tourism Department, with all assessments standing in his name.

3.3. Subsequently, on 18.12.2004, the plaintiff / Respondent No. 1 – K.T.Mathew @ Thampan Thomas, instituted O.S. No. 684 of 2004 before the Sub Court, Ernakulam[2] for recovery of Rs. 43,82,767/- from Defendant Nos. 2 to 4. Along with the suit, he filed I.A. No. 6530 of 2004 under Order XXXVIII Rule 5 of the Civil Procedure Code, 1908[3] seeking attachment of the aforesaid property before judgment stating that it absolutely belonged to Defendant No. 3 by virtue of Partition Deed No.2725 of 1982.

3.4. The property in question came to be subjected to an order of attachment before judgment on 13.02.2005. The original applicant is stated to have come to know of this attachment only in 2007. Thereafter, he filed I.A. No. 2627 of 2007 under Order XXXVIII Rule 8 CPC seeking release of the property. The plaintiff / Respondent No. 1 resisted the application stating that the transfer was fraudulent, intended to defeat creditors and unsupported by genuine consideration.

3.5. The trial Court, by order dated 24.02.2009, dismissed the claim petition, holding that the transfer of the aforesaid property in favour of the original applicant was fraudulent and squarely hit by Section 53 of the Transfer of Property Act, 1882[4].

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[2] For short, "the trial Court"
[3] For short, "CPC"
[4] For short, "T.P. Act"

3.6. Aggrieved thereby, the original applicant preferred RFA No. 347 of 2009 before the High Court. During the pendency of the appeal, the original applicant passed away and his legal heirs were brought on record. By judgment dated 13.02.2023, while upholding rejection of the claim petition, the High Court partly allowed the appeal with a direction to the trial Court to determine the claim relating to the amount, if any, payable to the purchaser from the debtor, including any part of the genuine sale consideration, and dispose of the same, within two months from the appearance of the parties.

3.7. Being dissatisfied with the judgment of the High Court, the appellants are before this Court with the present appeal.

4. The learned senior counsel for the appellants, at the outset, contended that attachment before judgment could not have been ordered against a property that had already been transferred prior to the institution of the suit. Relying on the principles laid down by this Court in ***Hamda Ammal v. Avadiappa Pathar***[5], it was urged that where execution of a sale deed is complete on the date of institution of the suit, an application under Order XXXVIII Rule 5 CPC is not maintainable. The Court, while dealing with such an application, has no jurisdiction to go into the nature of the transaction or to declare a sale deed collusive under Section 53 of the T.P. Act, for that would be beyond the scope of jurisdiction in proceedings under Order XXXVIII Rule 5 CPC. The only remedy available to a decree-holder, who alleges that a transfer effected before

[5] (1991) 1 SCC 715

the institution of the suit is fraudulent or collusive is to file an independent suit under Section 53 of the T.P. Act.

4.1. Continuing further, it was argued that the courts below, while considering the application for lifting the attachment, committed a manifest error in declaring the sale deed to be collusive as if they were adjudicating a suit under Section 53 of the T.P. Act. In the present case, the sale deed in favour of the original applicant was executed on 28.06.2004 by Defendant No. 3, whereas the suit was instituted only on 18.12.2004 and the order of attachment was passed subsequently on 13.02.2005. Since the transfer had been completed nearly six months prior to the institution of the suit, the application under Order XXXVIII Rule 5 CPC against the petition schedule property was, according to the counsel, wholly misconceived and not maintainable.

4.2. The learned senior counsel also submitted that the finding of the courts below that the sale deed was a collusive transfer is factually and legally unsustainable. There is no evidence on record to establish that the sale deed was fraudulently created. Under Section 53 of the T.P. Act, the burden of proof squarely lies upon the person, who alleges fraud, and mere suspicion cannot suffice. The courts below, however, proceeded only on conjectures and surmises. It is a well-settled principle of law that however suspicious a transaction may appear, suspicion cannot be a substitute for proof.

4.3. Placing reliance on Order XXXVIII Rule 10 CPC, it was urged that attachment before judgment shall not affect rights, existing prior to such attachment of persons not parties to the suit. In the instant case, the original applicant purchased the property for valuable consideration and in good faith, without being a party to any design of the vendor to defeat or delay creditors. His rights, therefore, cannot be defeated even if the transferor's intention was fraudulent. The courts below, instead of giving effect to this settled principle, wrongly concluded that there was evidence of fraud on the part of Defendant No. 3.

4.4. The learned senior counsel further pointed out that the adverse inference drawn against the claimant for non-production of certain bank records was wholly unjustified, particularly when no application had been filed by the plaintiff for their production. On the contrary, the transaction stood supported by contemporaneous documentary evidence. Defendant No. 3 had executed an agreement dated 10.05.2002 acknowledging liability of Rs. 17.25 lakhs due to the claimant, with a stipulation to convey 5.100 cents of property in case of default. The endorsements on the reverse of the agreement evidenced receipt of Rs. 3 lakhs in cash and Rs. 2.5 lakhs by cheque on 25.06.2004, pursuant to which the registered sale deed was executed on 28.06.2004. In law, a registered sale deed prevails over a subsequent order of attachment. In this background, the sale deed in favour of the claimant, it was submitted, is unassailable and the

courts below exceeded their jurisdiction by virtually converting the attachment proceedings into a full-fledged trial of a suit under Section 53 of the T.P. Act.

4.5. It was also contended that the finding of the courts below regarding delay in filing the claim petition is equally unsustainable. The observation that the original applicant came to know of the attachment in 2005 but filed the claim petition only on 12.04.2007 and that such delay strengthened the allegation of fraud is perverse and arbitrary. In rendering such a finding, the courts below overlooked the principles of the law of limitation. According to the learned senior counsel, as on the date of attachment and much earlier, the original applicant was already the owner in possession of the property and his *bona fide* rights could not be defeated merely on the ground of delay.

4.6. Therefore, the learned senior counsel submitted that the impugned judgment and order of the courts below are erroneous, arbitrary, and liable to be set aside.

5. In response, the learned senior counsel for Respondent No. 1 submitted that the legal position is well settled that once a property is attached, any person claiming the property to be his can prefer a claim petition before the Court. In the present case, the property was attached on 13.02.2005 and the appellant filed a claim petition only in April, 2007. Rule 8 of Order XXXVIII CPC specifically provides that such a claim shall be adjudicated in the same manner as a claim to

property attached in execution of a decree for payment of money under Order XXI Rule 58.

5.1. It was further submitted that Order XXI Rule 58 expressly provides that all questions relating to right, title, and interest of the property attached are to be adjudicated by the executing court. With respect to the question, whether a plea under Section 53 of the T.P. Act can be raised by a creditor in a proceeding under Order XXI Rule 58, reliance was placed on the judgment of this Court in ***Abdul Shukoor Saheb v. Arji Papa Rao***[6], where even prior to the 1976 Amendment to Order XXI Rule 58, it was recognised that such issues could be gone into. In that case, the debtor had effected transfer of property to a third party in 1949, and soon thereafter a suit was filed in 1950 followed by an order of attachment before judgment. The learned senior counsel pointed out that the legal position underwent a radical change post – 1977, by virtue of Act 104 of 1976, which substituted Order XXI Rule 58. The amended provision broadened the scope of adjudication, mandating that questions relating to right, title, or interest in the attached property be comprehensively decided in execution proceedings themselves, thereby eliminating the necessity of a separate suit under Section 53 of the T.P. Act.

5.2. It was argued that a creditor is fully entitled to challenge a transfer as fraudulent under Section 53 of the T.P. Act in a proceeding under Order XXXVIII Rule 8 read with Order XXI Rule 58. This principle was affirmed by

[6] (1962) 2 SCR 55

this Court, recognising that creditors must be adequately protected where debtors, in collusion with third parties, effect transfers with the intent to defeat legitimate claims. In the present case, both the trial Court and the High Court, upon analysing the evidence, correctly held that the transfer of the subject property in favour of the original applicant was a fraudulent transaction squarely falling within the ambit of Section 53 of the T.P. Act.

5.3. The learned senior counsel further submitted that the appellants' reliance on ***Hamda Ammal v. Avadiappa Pathar*** (supra) is misplaced. In that decision, this Court observed that Order XXXVIII Rule 5 would not apply where a sale deed had already been executed prior to the institution of the suit. However, the Court carved out an express exception for cases involving Section 53 of the T.P. Act, thereby recognising that fraudulent transfers stand on a different footing and may be adjudicated within the framework of attachment proceedings.

5.4. Therefore, it was urged that the consistent judicial interpretation has been to safeguard the rights of creditors. A narrow construction of Order XXXVIII Rules 5 and 8 read with Order XXI Rule 58 would render creditors remediless, thereby enabling debtors to alienate their properties in collusion with third parties to defeat lawful claims. Such a construction would frustrate the very protection contemplated under Section 53 of the T.P. Act. The correct position in law, according to the learned senior counsel, is that fraudulent transfers must be adjudicated within the framework of Order XXXVIII Rule 8 read with Order

XXI Rule 58 CPC, and once fraud is established, the property remains liable to attachment notwithstanding any prior transfer.

5.5. In light of these submissions, the learned senior counsel prayed that the appeal be dismissed as being devoid of merits.

6. We have heard the learned senior counsel appearing on behalf of both parties and perused the materials available on record.

7. On 14.07.2023, when the matter was taken up for consideration, this Court directed the parties to maintain *status quo* until further orders.

8. Seemingly, the registered sale deed in favour of the original applicant was executed on 28.06.2004. The plaintiff / Respondent No. 1 filed O.S. No. 684 of 2004 only on 18.12.2004. The order of attachment before judgment under Order XXXVIII Rule 5 CPC came to be passed subsequently on 13.02.2005. Thus, as on the date of filing of the suit, the property already stood transferred to the original applicant. Nevertheless, both the trial Court and the High Court rejected the claim petition filed by the original applicant under Order XXXVIII Rule 8 CPC, holding that the sale deed was a fraudulent transfer within the meaning of Section 53 of the T.P. Act.

9. The principal issue that arises for consideration in this appeal is, whether the registered sale deed dated 28.06.2004 executed in favour of the original applicant constitutes a fraudulent transfer under Section 53 of the T.P. Act, and

consequently, whether the attachment before judgment ordered by the trial Court in O.S. No. 684 of 2004 could validly operate against the property in question.

10. At the outset, it is necessary to examine the relevant statutory provisions applicable to the present case.

10.1. Order XXXVIII Rules 5 to 10 CPC lay down a complete scheme governing attachment before judgment, and read as follows:

> ***"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 defendant, 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 defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and 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 and 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 the order direct the conditional attachment of the whole or any portion of the property so specified.*
> *[7][(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.]*
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> ***6.Attachment where cause not shown or security not furnished***
> *(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.*
>
> *(2) Where the defendant shows such cause or furnishes the required security,*

[7] Inserted by Act No. 104 of 1976 sec. 85 (w.e.f. 1-2-1977)

and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

7.Mode of making attachment
Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

[8]***[8. Adjudication of claim to property attached before judgment***
Where any claim is preferred to property attached before judgment, such claim shall be adjudicated upon in the manner hereinbefore provided for the adjudication of claims to property attached in execution of a decree for the payment of money.]

9. Removal of attachment when security furnished or suit dismissed
Where an order is made for attachment before Judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the cost of the attachment, or when the suit is dismissed.

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."

10.1.1. Rule 5 empowers the Court, where it is satisfied that the defendant, with intent to obstruct or delay the execution of any decree, is about to dispose of or remove his property, to direct him to furnish security or to show cause, and to order conditional attachment of the property. Rule 6 provides that if the defendant fails to show cause or to furnish security, the Court may order attachment, whereas compliance requires the attachment to be withdrawn. Rule 7 prescribes that such attachment shall be made in the same manner as in execution under Order XXI. Rule 8 directs that any claim or objection to

[8] Substituted by Act No. 104 of 1976 for rule 8 (w.e.f. 1-2-1977)

property attached before judgment shall be adjudicated as if it were a claim in execution. Rule 9 provides for withdrawal of attachment when the defendant furnishes security or when the suit is dismissed. Rule 10 safeguards the rights of strangers by clarifying that attachment before judgment does not affect pre-existing rights of non-parties nor create any proprietary interest in favour of the plaintiff. Thus, the scheme of Rules 5 to 10 is self-contained, balancing the plaintiff's right to secure the decree with safeguards for the defendant and protection of third-party rights. Attachment before judgment is therefore only a protective measure and does not create any charge or ownership in favour of the plaintiff.

10.2. A significant change was introduced by the Amendment Act 104 of 1976. Order XXI Rule 58 was substituted to enlarge the scope of adjudication of claims and objections. Earlier, a claimant was required to institute a separate suit under Order XXI Rule 63 or invoke Section 53 of the T.P. Act. The amended Rule now mandates that all questions relating to right, title, or interest of the property attached be determined in execution itself. By virtue of Order XXXVIII Rule 8, this procedure equally applies to attachments before judgment, thereby extending the same protection to third-party claimants. For ease of reference, Order XXI Rule 58 is extracted below:

> ***"Rule 58. Adjudication of claims to, or objections to attachment of, property***—
> *(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such*

property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained: Provided that no such claim or objection shall be entertained—
(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or
(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.
(2) All questions (including questions relating to right, the title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.
(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination,—
(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or
(b) disallow the claim or objection; or
(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or
(d) pass such order as in the circumstances of the case it deems fit.
(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.
(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive."

Thus, the effect of the amended Rule 58 is that the Executing Court shall adjudicate all questions relating to right, title, or interest of the property attached between the parties to the claim proceedings, and its determination has the force of a decree. By virtue of Rule 8, this scheme applies equally to claims regarding property attached before judgment, thereby ensuring that third parties asserting independent rights in such property have their claims adjudicated on merits, without being driven to a separate suit. Rule 10 further reinforces this position

by clarifying that an attachment before judgment does not affect pre-existing rights of strangers nor does it create any substantive charge in favour of the plaintiff.

10.3. Section 53 of the T.P. Act deals with fraudulent transfer and reads as follows:

> ***"53. Fraudulent transfer.-*** *(1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.*
> *Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.*
> *Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.*
> *A suit instituted by a creditor (which term includes a decree -holder whether he has or has not applied for execution of his decree) to avoid a transfer on th e ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.*
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> *(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.*
> *For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."*

The above provision thus contemplates two essential elements – (i) a transfer of immovable property made with the intent to defeat or delay creditors, which renders such transfer voidable at the option of the creditors so defeated or delayed; and (ii) the protection accorded to transferees in good faith and for valuable consideration, whose rights are expressly saved under the proviso to the sub-section. Further, under sub-section (2), every transfer of immovable

property made without consideration and with intent to defraud a subsequent transferee shall be voidable at the option of such subsequent transferee. However, for the purposes of this sub-section, a transfer made without consideration shall not be deemed to have been made with intent to defraud merely because a subsequent transfer for consideration has been effected.

11. Having considered the rival submissions and the relevant provisions of law, it becomes necessary to analyse the scope and effect of Order XXXVIII Rules 5 and 8 in conjunction with Order XXI Rule 58 CPC and Section 53 of the T.P. Act.

11.1. The scope of Rule 5 is confined to securing the plaintiff's prospective decree by preventing the defendant from frustrating execution through alienation or concealment of his property during pendency of the suit. The essential condition, however, is that the property sought to be attached must belong to the defendant on the date of institution of the suit; property already transferred prior to the suit cannot be attached under this provision. In cases where such prior transfer is alleged to be fraudulent, the remedy lies under Section 53 of the T.P. Act and not under Order XXXVIII Rule 5 CPC.

11.2. Rule 8 incorporates the adjudicatory mechanism of Order XXI Rule 58 CPC in respect of claims to property attached before judgment. While the amended Rule 58 of Order XXI CPC enlarges the scope of inquiry, such adjudication must nonetheless be based on proper pleadings and evidence.

11.3. The combined reading of Rules 5 to 10 makes it clear that Rule 5 operates at the stage of ordering attachment, while Rule 8 read with Order XXI Rule 58 governs the stage of adjudication of third-party objections. Rule 10 emphasises that attachment before judgment does not create any charge or proprietary interest for the plaintiff and that pre-existing rights of strangers remain unaffected. Thus, attachment before judgment is only an ancillary, protective relief to secure the decree, subject to adjudication of independent claims, and cannot prejudice pre-existing rights or confer any substantive advantage upon the plaintiff beyond securing satisfaction of the decree.

12. Applying the above legal framework to the facts of the present case, it is apparent that the registered sale deed in favour of the original applicant was executed on 28.06.2004 i.e., several months prior to the institution of the suit in O.S. No. 684 of 2004. Consequently, at the time of filing of the suit, the property stood transferred and was no longer in the possession or ownership of Defendant No. 3. In such circumstances, the essential condition for invoking attachment before judgment under Order XXXVIII Rule 5 CPC – that the property belongs to the defendant on the date of institution of the suit – is absent. The plaintiff's remedy, if any, lies exclusively under Section 53 of the T.P. Act, which provides for setting aside a transfer made with intent to defraud creditors.

13. While the trial Court and High Court examined the claim petition under Order XXXVIII Rule 8 CPC read with Order XXI Rule 58 CPC, the adjudication of the sale deed's validly as a fraudulent transfer necessarily required determination under Section 53 of the T.P. Act. The mechanism under Rule 8, being a protective procedure designed for third-party claimants asserting independent rights in the property attached before judgment, cannot be expanded to transform the attachment procedure into a substantive enquiry under Section 53 of the T.P. Act. Therefore, the attachment before judgment ordered on 13.02.2005 could not extend to the property already transferred to the original applicant on 28.06.2004.

14. In the present case, the sale deed executed on 28.06.2004 in favour of the original applicant was duly registered and the transfer stood completed prior to the institution of the suit. The documents available on record do not demonstrate that the original applicant was a party to any collusion or mala fide transaction with Defendant No. 3 to defraud the plaintiff. The allegation of fraud, therefore, falls squarely within the ambit of Section 53 of the T.P. Act and cannot be addressed merely through a claim petition under Order XXXVIII Rule 8 CPC. Attachment before judgment being an extraordinary and protective remedy, cannot extend to property already alienated to a *bona fide* third party prior to the filing of the suit. Any adjudication in the claim petition that ignores this

statutory pre-condition would be contrary to the scheme of the Code and settled principles governing attachment before judgment.

15. The onus to establish that the transfer was made with an intent to defeat or delay creditors lies squarely upon the party alleging fraud. Mere suspicion, inadequacy of consideration or the existence of a relationship between the parties, cannot, by themselves, constitute proof of such intent. Moreover, while the conclusion for fraud must rest on established facts and legitimate inferences drawn therefrom, every device or artifice need not be fully unravelled to sustain a finding of fraud. In the present case, Respondent No. 1 (creditor) has failed to produce cogent evidence showing that the dominant purpose of the impugned transfer was to defeat his rights. The circumstances relied upon, such as community ties, financial difficulties of Defendant No. 2, and partial cash consideration, may give rise to suspicion, but suspicion cannot substitute legal proof. The property was transferred for stated consideration under a duly registered deed and possession duly followed. There is no evidence to prove that the transfer rendered the transferor insolvent or that the creditor suffered any actual and irretrievable prejudice.

16. Though it was contended on behalf of Respondent No. 1 that the major portion of the consideration comprised adjustment of earlier debts (Rs.23,93,000/-) and discharge of bank dues (Rs.8,57,000/-), the same does not invalidate the transaction. Section 25 of the Indian Contract Act, 1872,

recognizes past liability as valid consideration. Further, the existence of an antecedent agreement dated 10.05.2002 and subsequent dealings between the parties sufficiently establish that the sale deed was supported by valuable consideration. The contention that the agreement dated 10.05.2002 contemplated transfer only if dues remained unpaid till 2005 whereas the sale deed was executed in 2004 merely indicates that parties advanced the timeline of performance. Such alteration in contractual arrangement, by mutual consent, is common and does not *ipso facto* render the transfer fraudulent. Significantly, under Section 53(1) of the T.P. Act, the transaction would be voidable only if it is proved to have been made with an intend to defeat or delay creditors. No such fraudulent intent has been proved in the present case.

17. It is well settled that attachment before judgment cannot extend to properties which have already been alienated prior to the institution of the suit. In ***Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan***[9]**,** this Court held that an agreement for sale creates an obligation attached to the ownership of the property and an attaching creditor is entitled to attach only the right, title, and interest of the judgment debtor. If an agreement for sale is entered into before attachment, the attaching creditor cannot ignore such obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment debtor. The rights of the attaching creditor cannot override the contractual obligation arising from the antecedent agreement.

[9] (1990) 3 SCC 291

Accordingly, the sale would not be subject to the attachment and the purchaser would get good title despite attachment. The following paragraphs from the said judgment are relevant in this regard:

> *"**5.** We may first draw attention to some of the relevant statutory provisions bearing on the question. Order XXXVIII Rule 10 of the Code of Civil Procedure provides that attachment before judgment shall not affect the rights existing prior to the attachment of persons not parties to the suit. Under Section 40 of the Transfer of Property Act, a purchaser under a contract of sale of land is entitled to the benefit of an obligation arising out of that contract and it provides that that obligation may be enforced inter alia against a transferee with notice. Section 91 of the Trusts Act also recognises this principle that the transferee with notice of an existing contract of which specific performance can be enforced must hold the property for the benefit of the party to the contract. These are equitable rights though not amounting to interest in immovable property within the meaning of Section 54 of the Transfer of Property Act which declares that a contract of sale does not create an interest in the property. On this line of reasoning it has been held by the Madras High Court that the purchaser of an antecedent agreement gets good title despite attachment. See Paparaju Veeraraghavayya v. Killaru Kama Devi and others, AIR 1935 Mad. 193, Veerappa Thevar & Ors. v. C.S. Venkataramma Aiyar & Ors., AIR 1935 Mad. 872 and Angu Pillai v. M.S.M. Kasiviswanathan Chettiar, AIR 1974 Mad. 16.*
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> ***6.** There is a useful parallel from the decision of the Calcutta High Court in Purna Chandra Basak v. Daulat Ali Mollah, AIR 1973 Cal. 432 wherein it was observed that the attaching creditor attaches only the right, title and inter- est of the debtor and attachment cannot confer upon him any higher right than the judgment-debtor had at the date of attachment.*
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> ***7.** Hence, under a contract of sale entered into before attachment, the conveyance after attachment in pursuance of the contract passes on good title inspite of the attachment. To the same effect are the decisions of the Bombay High Court in Rango Ramachandra Kulkarni v. Gurlingappa Chinnappa Muthal AIR 1941 Bom. 198 and Yashvant Shankjar Dunakhe v. Pyaraji Nurji Tamboli, AIR 1943 Bom. 145. The High Court of Travancore- Cochin in Kochuponchi Varughese v. Quseph Lonan, AIR 1952 Travancore-Cochin 467 has also adopted the same reasoning.*
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> ***8.** The Punjab & Haryana High Court however, has taken a contrary view in Mohinder Singh, Etc., v. Nanak Singh, Etc., AIR 1971 P & H 381. It has been held that a sale in pursuance of a pre-attachment agreement is a private*

alienation of property and must be regarded as void against the claim ot the attaching creditor. In support of this proposition, Section 64 of the Code of Civil Procedure was relied upon which according to the High Court was intended to protect the attaching creditor against private alienation. This was also the observation of the Lahore High Court in Buta Ram & Ors. v. Sayyed Mohammad, AIR 1935 Lahore 71.

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's case AIR 1971 P & H 381."*

18. The principle that attachment before judgment cannot override a prior completed transfer was categorically laid down in ***Hamda Ammal v. Avadiappan Pathar*** (supra). In that case, the appellant purchased the suit property under a sale deed executed on 09.09.1970, though the deed was registered later on 26.10.1970. Meanwhile, the creditor had filed a suit on 13.09.1970 and obtained attachment before judgment on 17.09.1970. The issue before this Court was whether the prior executed though subsequently registered sale deed would prevail over the attachment. Answering in favour of the purchaser, this Court held that execution of the sale deed, even though

registration followed later, operated to transfer the property prior to attachment. It was held thus:

> *"**2.** ... Order XXXVIII Rule 5 CPC... would not apply where the sale deed has already been executed by the defendant in favour of a third person. A transaction of sale having already taken place even prior to the institution of a suit cannot be said to have been made with the intention to obstruct or delay the execution of any decree. It would be a different case altogether if a creditor wants to assail such transfer by sale under Section 53 of the Transfer of Property Act, 1882 on the ground of a fraudulent transfer. Such suit would be decided on totally different considerations in accordance with the provisions of Section 53 of the Act ...."*

Further, the Court concluded:

> *"**6.** ... The property in question admittedly belonged to the defendant – judgement debtors (vendors) and once it is held that a sale deed had already been executed by them... and only its registration remained, then neither the attachment before judgment nor a subsequent attachment or court sale... can confer any title...by preventing the relation back. The fact that the document of sale had not been registered until after the attachment makes no difference."*

And, finally:

> *"**12.** .... We are of the confirmed opinion that a sale deed having been executed prior to attachment before judgment, though registered subsequently will prevail over attachment before judgment."*

19. In ***Rajender Singh v. Ramdhar Singh***[10]**,** this Court reiterated that an agreement for sale creates an equitable obligation attached to the ownership of property. Consequently, an attaching creditor cannot acquire rights higher than those of the judgment-debtor; the attachment is always subject to pre-existing contractual obligations such as an agreement to sell executed prior to attachment. The Court reaffirmed that once a valid agreement to sell exists, the

[10] (2001) 6 SCC 213 : 2001 SCC OnLine SC 784

attaching creditor takes the property encumbered by that contractual obligation, even if the creditor had no notice of the agreement. Thus, an attachment does not override prior contractual obligations. The following paragraphs are pertinent in this regard:

> *"**18.** The respondents had also urged another ground to set aside the same, namely, that there were two deeds of baibeyana (agreement to sell), one of 9-2-1974 and another of 16-2-1974 prior to the date of attachment, namely, 6-3-1974. The respondents had contended before the executing court that these agreements should prevail over the attachment but this plea was rejected by the Subordinate Judge on the ground that the attachment does prevail over the pre-existing contract to sell even though the attaching creditor has no notice of a contract to sell. The very same plea was advanced before the learned Single Judge of the High Court but the same was not considered as the decision was taken in the matter having regard to non-compliance with Section 136 of the Code of Civil Procedure and the learned Single Judge felt that it was not necessary for him, in this case, to consider that plea.*
>
> ***19.** As we have taken a contrary view regarding Section 136, the matter has to go back to the learned Single Judge to consider the plea raised by the respondents regarding the two agreements allegedly executed by them. It may be noted that as regards the question whether the agreement entered into by the judgment-debtor prior to the attachment of property in execution of a decree would prevail over the attachment itself, was considered by this Court in Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan [(1990) 3 SCC 291] and this Court approved the views expressed in Paparaju Veeraraghavayya v. Killaru Kamala Devi [AIR 1935 Mad 193], Veerappa Thevar v. C.S. Venkatarama Aiyar [AIR 1935 Mad 872 : ILR 59 Mad 1] , Angu Pillai v. M.S.M. Kasiviswanathan Chettiar [AIR 1974 Mad 16 : (1973) 1 MLJ 334], followed by Rango Ramchandra Kulkarni v. Gurlingappa Chinnappa Muthal [AIR 1941 Bom 198 : 43 Bom LR 206], Yeshvant Shankar Dunakhe v. Pyaraji Nurji Tamboli [AIR 1943 Bom 145 : 45 Bom LR 208] and Kochuponchi Varughese v. Ouseph Lonan [AIR 1952 TC 467] and held that the agreement for sale 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."*

20. In view of the foregoing, it is evident that:

(a) The original applicant's sale deed dated 28.06.2004 pre-dates the institution of the suit, and therefore, the property did not belong to the defendant on the date of filing of O.S. No. 684 of 2004;

(b) Attachment before judgment under Order XXXVIII Rule 5 CPC could not be extended to the property already transferred;

(c) Any claim under Order XXXVIII Rule 8 read with Order XXI Rule 58 CPC must be adjudicated recognizing the protective and procedural nature of attachment before judgment, without prejudicing the pre-existing rights of *bona fide* third parties;

(d) Determination of whether the sale deed is fraudulent is exclusively governed by Section 53 of the T.P. Act and the claim petition procedure under Rule 8 cannot substitute or override the statutory safeguards and requirements of such substantive proceedings.

21. Thus, this Court holds that the registered sale deed dated 28.06.2004 executed in favour of the original applicant is valid. Consequently, the attachment before judgment ordered on 13.02.2005 could not legally extend to the said property. The claim petition filed by the original applicant under Order XXXVIII Rule 8 CPC read with Order XXI Rule 58 CPC is therefore sustainable. Accordingly, the impugned judgment and order passed by the courts below are set aside.

22. In the result, the Civil Appeal stands allowed. There is no order as to costs.

23. Pending Application(s), if any, stand disposed of.

…….J.
[B.V. NAGARATHNA]

…….J.
[R. MAHADEVAN]

NEW DELHI;
NOVEMBER 28, 2025