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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF MAY, 2018

BEFORE

THE HON'BLE Dr. JUSTICE H.B.PRABHAKARA SASTRY

REGULAR SECOND APPEAL No.2313/2008 (MON)

BETWEEN:

Swamy H.L.
Aged about 54 years,
S/o. M. Lingaiah,
R/o. Hosahalli Extn.
Mandya City -582 101.

...Appellant

(By Sri. D.R. Sundaresha, Advocate)

AND:

1. Lakshamma
Major,
W/o. Thimmegowda,
R/o. 7th Cross, Gandhinagar,
By GPA Holder, T. Somashekhar,
S/o. Thimmegowda.

2. V.T. Rajachar
Major,
S/o. Thammachar.

3. Channajamma
Major,

R-2 and R-3 Both residing at
No.2958, 7th Cross,

Gandhinagar,
Mandya City-582 101.

...Respondents

(By Smt. Archana Murthy, Advocate
For R-1)

This Appeal is filed under Section 100 CPC against the judgment and decree dated:19.09.2008 passed in R.A.No.68/2004 on the file of the Addl. Civil Judge (Sr. Dn.) & CJM, Mandya, allowing the appeal and setting aside the order dated:05.07.2004 passed on I.A.No.4 in Ex.No.127/1999 on the file of the Prl. Civil Judge (Jr. Dn) & JMFC, Mandya, dismissing the I.A.No.4 filed under Order 21 Rule 58 of CPC.

This Appeal coming having been heard and reserved for judgment on 23.04.2018, coming on for pronouncement of judgment, this day the Court delivered the following :

JUDGMENT

This appeal arises out of judgment and decree dated 19.9.2008, passed by the Court of Civil Judge (Sr.Dn.), & CJM, Mandya (henceforth for brevity referred to as "the First Appellate Court"), in Regular Appeal No.68/2004, which appeal was instituted against an order dated 5.7.2004, on the application of the 1st respondent herein under Order XXI Rule 58 read

with Section 151 of Code of Civil Procedure, 1908 (henceforth for brevity referred to as `CPC') passed by the Prl.Civil judge (Jr.Dn.), Mandya, (henceforth for brevity referred to as "the Executing Court") in Execution No.127/1999, on his file, rejecting the said application of the applicant.

2. The essential facts leading to the present appeal can succinctly be put thus : the appellant herein, who shall hereinafter be referred to as plaintiff/deGREE holder, in this judgment, laid a suit on 8.1.1992 in O.S.No.41/1992, on the file of the trial Court for recovery of ₹26,800/- with interest, from 2nd and 3rd respondents herein, who shall hereinafter referred to as the judgment debtor Nos.1 and 2 respectively, based on on-demand promissory notes dated 10.4.1991 and 6.7.1991. The plaintiff along with the suit, maintained an interlocutory application No.1, filed under Order

XXXVIII Rule 5 of CPC, praying for conditional attachment of suit schedule property before judgment. The trial Court on the date of institution of the suit i.e., on 8.1.1992, on the above application, passed conditional attachment order in respect of suit schedule property of the judgment debtors 1 and 2. The attachment order, as well suit summons were served on the judgment debtors 1 and 2, who are the husband and wife, on 10.1.1992. The judgment debtor No.2 though claims to have executed an unregistered Sale Deed in favour of one Dorai Raj (RW-2) on 2.1.1992, but registered the said Sale Deed on 10.1.1992 (Ex.R-2), on which day, she received attachment order and summons from the trial Court. The suit of the plaintiff/decree holder was decreed on 31.3.1993 in O.S.No.41/1992. The plaintiff/decree holder levied Execution No.312/1993, which was closed on 2.3.1996 for technical reasons. RW-2 Dorai Raj had executed Ex.R-3,

a Sale Deed on 9.3.1994, in favour of the 1st respondent herein (applicant before the Executing Court– Smt.Lakshamma). The plaintiff/ decree holder levied another Execution No.127/1999. The 1st respondent/ applicant sought to release the suit schedule property from attachment in Execution No.127/1999 through her application filed under Order XXI Rule 58 read with Section 151 of CPC, on 21.9.2000, which was numbered as IA.No.4.

In her IA.No.4, the applicant (respondent No.1 herein) had mainly contended that she was a *bona fide* purchaser of the suit schedule property and that the second execution petition of the plaintiff was not maintainable as it was levied after a lapse of six years from the date of disposal of the first execution petition and also that the decree holder had no right to bring the

suit schedule property for the sale as attachment order was already ceased.

The decree holder opposed the said application by filing his counter and contended that the judgment debtor No.2 had no right to sell the suit schedule property who had sold the same on the very day of she receiving the attachment order of the property.

3. In the enquiry held by the Executing Court on the said application, the Power of Attorney Holder of decree holder stepped into the witness box as PW-1 and got marked four documents. The 1st respondent got examined her son and Power of Attorney Holder as RW-1 and her vendor Dorai Raj as RW-2 and got marked four documents. After hearing both side, the Executing Court by its order dated 5.7.2004, dismissed IA.No.4 of the 1st respondent.

4. Being aggrieved by the said order of the Executing Court, the present respondent No.1 preferred a Regular Appeal No.68/2004, before the First Appellate Court. The First Appellate Court framed the following points for its consideration.

- 1. Whether the impugned attachment order before judgment in respect of suit schedule property prevailed on the alienation of suit schedule property by Judgment Debtor No.2 in favour of RW.2 and appellant herein?*
- 2. Whether the impugned attachment order before judgment ceased to subsist by virtue of dismissal of Ex.No.312/1993?*
- 3. Whether the trial Court has properly appreciated the materials and case laws in a proper prospective?*
- 4. If so, what order?*

After hearing both side, the First Appellate Court by its judgment and decree dated 19.9.2008, answered point Nos.1 and 2 in the affirmative, point No.3 partially in negative and holding that the earlier Execution No.312/1993, was dismissed on 2.3.1996 and order of the attachment before judgment has ceased to subsist after dismissal of the said Execution No.312/1993 on 2.3.1996, allowed the appeal by setting aside the order of the Executing Court dated 5.7.2004 and allowing IA.No.4 filed by the 1st respondent herein under Order XXI Rule 58 read with Section 151 of CPC. It is against the said judgment and decree of the First Appellate Court, the plaintiff/decree holder has preferred this Regular Second Appeal.

5. This Court admitted the appeal and framed the following substantial questions of law :

" 1. Whether the attachment before the judgment passed under Order XXXVIII Rule 6 of Code of Civil Procedure, 1908, lapses / expires by the dismissal of the execution petition and the advantage of the order of attachment before the judgment is not available to the decree holder in his subsequent execution petition between the same parties with respect to the same decree?

(2) Whether the lower Appellate Court committed an error and not justified in law by allowing the application filed by the respondent herein under Order XXI Rule 58 of Code of Civil Procedure, 1908?

This Court by the order dated 2.4.2018, has framed the following additional substantial question of law for consideration :

"Whether the subsequent registration of the Sale Deed with respect to the immovable property and the order of

attachment under Order XXXVIII Rule 6 of Code of Civil Procedure passed after the Sale Deed would make the said order of attachment ineffective?"

6. In response to the notice, the respondent No.1 is being represented by her Counsel.

7. The lower Court records were called for and the same are placed before the Court.

8. Heard arguments of learned Counsel from both side. Perused the materials placed before this Court.

9. The learned counsel for the appellant/deGREE holder in his argument submitted that the finding of the First Appellate Court that the order of attachment before judgment passed in the original suit has expired by the dismissal of Execution No.312/1993, is an erroneous finding and a wrong interpretation of Order XXXVIII Rule 11 of CPC. He further submitted that in view of Section

64 of CPC, the subject matter property which was suffering an order of attachment before judgment was sold by judgment debtor privately to a third party and by a third party to another person during the subsistence of attachment, as such, the said sale is void as against claims enforceable under the attachment. In his support, learned counsel relied upon few judgments of some High Courts and Hon'ble Supreme Court which would be referred herein afterwards at appropriate stages.

10. Learned counsel for the respondent No.1 in her argument submitted that in the light of Order XXI Rule 57 read with Order XXXVIII Rule 11-A of CPC, the order of attachment before judgment ceased to be in existence by the dismissal of Execution No.312/1993. The subsequent institution of Execution No.127/1999 would not retrieve and restore the said order of

attachment before judgment, much less, retrospectively. As such, the First Appellate Court has rightly allowed the application of the objector. In her support, learned counsel relied upon few judgments of High Courts which would be referred to at appropriate stages herein afterwards.

11. In the instant case, judgment debtor No.2 is said to have executed an unregistered Sale Deed as per Ex.R-2 in favour of one Dorai Raju (RW-2) on 2.1.1992. As against the very same property, which was the subject matter of the said alleged Sale Deed dated 2.1.1992, an order of attachment before judgment under Order XXXVIII Rule 6 of CPC was passed by the competitive Court in O.S.No.41/1992, on 8.1.1990. The said order was communicated and suit summons were served upon judgment debtor No.2 on 10.1.1992. On the very same day, the Sale Deed dated 2.1.1992 was

registered. The suit of the plaintiff/decreed holder was decreed on 31.3.1993. The decreed holder filed Execution No.312/1993 on 27.11.1993, which was closed on 2.3.1996 for technical reasons. In the meanwhile, RW-2 Dorai Raju had executed a Sale Deed as per Ex.R-3 on 9.3.1994 in favour of respondent No.1 herein. The said respondent No.1 filed IA.No.4 under Order XXI Rule 58 read with Section 151 of CPC in Execution No.127/1999 filed by the decreed holder, wherein the applicant/respondent No.1 sought to release the suit schedule property from attachment in execution case. Keeping this flow of events chronologically, the case has to be analysed.

Order XXXVIII Rule 11 of CPC reads as below :

" 11. Property attached before judgment not to be re-attached in execution of decree:- Where property is under attachment by virtue of the

provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall, not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.”

As per the above Rule, since the property, which was the subject matter of sale under Ex.R-2 and Ex.R-3, was under order of attachment before judgment during the pendency of O.S.No.41/1992 and since the said suit came to be decreed in favour of the plaintiff, there was no necessity for seeking re-attachment of the said property once again. As such, when the decree holder levied Execution No.312/1993, there was no necessity for the decree holder to seek re-attachment of the said property once again and the order of attachment before judgment passed in the original suit continues to enure to the benefit of decree holder even in the said Execution No.312/1993 also. To this extent, Order

XXXVIII Rule 11 of CPC comes to the aid of the appellant/decreed holder.

However, as already observed above, the said Execution No.312/1993 came to be dismissed on 2.3.1996. In the meantime, the said Dorai Raju (RW-2) had sold the very same property to the 1st respondent herein under registered Sale Deed on 9.3.1994 as could be seen in the Sale Deed at Ex.R-3. The decreed holder filed Execution No.127/1999 on 15.9.1999 i.e., three years six months after the dismissal of his earlier Execution No.312/1993. It is in this regard, learned counsel for the appellant/decreed holder has relied upon Section 64 of CPC, which reads as below :

" Section 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 moneys 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."

According to the said Section, any private transfer of the property attached contrary to such attachment shall be void as against all claim enforceable under the attachment. By virtue of sub-section (2) of Section 64 of CPC, which was inserted by amendment with effect from 1.7.2002, such a private transfer of the property attached would not affect any contract for such transfer or delivery entered into and registered before the

attachment. Thus, by virtue of sub-section (2) of Section 64 of CPC, to avail any exemption from the transfer of property being declared as void, it is to be established that such a contract for transfer was not only entered into before the attachment, but, the said contract document was duly registered.

12. Learned counsel for the appellant in his argument on the alleged contract of sale between judgment debtor No.2 and RW-2 Dorai Raju, relied upon few reported judgments, which are as below :

In ***Nancy John Lyndon -vs- Prabhati Lal Chowdhury and others*** reported in ***{(1987) 4 SCC 78}***, while dealing with Section 64 of CPC, the Hon'ble Supreme Court was pleased to hold that, where a property was sold by judgment debtor privately to a third party and by the third party to another person during subsistence of attachment, the sale was to be

held as void against claims enforceable under the attachment.

In ***Motilal Madanchand Lodha -vs- Ragho Tanaji Patil and others***, reported in ***(AIR 1974 Bombay 261)***, with respect to Section 64 of CPC, the learned Bombay High Court was pleased to hold that Section 64 of CPC contemplates only one attachment and no other. Obviously, the attachment, during subsistence of which the transfer is effected or delivery of property is made, must be the same attachment under which all claims of the attaching creditor are enforceable. When there were two attachments levied on one and the same property one after the other, and the first attachment had come to an end, and the decree holder has enforced his claim under the second attachment and has purchased the property at an auction sale in execution proceedings in which the

second attachment was levied, the claim of the decree holder cannot be said to be enforceable under the first attachment and, therefore, the private transfer made during the subsistence of the first attachment cannot be said to void under Section 64 of CPC.

In ***Official Receiver, Muzaffarnagar -vs- Chandra Shekhar and others***, reported in ***(AIR 1977 Allahabad 77)***, the learned Allahabad High Court was pleased to observe with respect to object of Section 64 of CPC that, a private transfer or delivery of the property attached is not wholly void. It is void "as against all claims enforceable under the attachment" and not otherwise. Section 64 of CPC has been incorporated to safeguard the interest of the creditors. It is not meant to deprive the owner of the interest of the property under attachment. As against the attaching creditor, a private sale would not be effective,

but, if the order of attachment is withdrawn or the claim of the creditor is otherwise satisfied, the sale deed executed would convey good title to the transferee.

The above judgments go to show that property sold by a judgment debtor privately to a third party and by the third party to another person during the subsistence of attachment, the sale becomes void as against claims enforceable under the attachment. The said settled proposition of law though was not disputed by the learned counsel for the 1st respondent, still, she contended that, in the instant case, agreement for sale of the property since had already been taken place prior to the order of attachment before judgment, the same would not fall under the ambit of Section 64 of CPC. The learned counsel relied upon the judgment of Hon'ble Supreme Court in ***Vannarakkal Kallalathil Sreedharan -vs- Chandramaath Balakrishnan and***

another, reported in **{(1990) 3 SCC 291}**, wherein the Hon'ble Supreme Court while dealing with Order XXXVIII Rule 10 and Section 64 of CPC, held that, 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 of 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.

Learned counsel for the respondent No.1 also relied upon the judgment of learned Single Judge of this Court in ***Sri D.L.Sridhar -vs- Sri C.R.Chandramohan and another***, reported in ***ILR 2008 KAR 591***, wherein with respect to Order XXI Rule 58 of CPC, finding that the appellant was lawful purchaser of the property before attachment, the Court was pleased to hold that the appellant being a *bona fide* purchaser for valuable consideration, alienation made in his favour prior to the attachment prevails over attachment.

13. In this way, even though under Section 64 of CPC, sale of property by a judgment debtor to a third

party during subsistence of attachment is void, still, if such a contract for sale is entered into prior to the attachment of the property, in such case, the alienation was held to be prevailing over attachment.

In the instant case, as already observed above, the attachment before judgment of the property was passed on 8.1.1992 and the same was communicated to the judgment debtor No.2 on 10.1.1992, whereas, the Sale Deed at Ex.R-2 shows that the said property was shown to have been sold to RW-2 Dorai Raju on 2.1.1992 i.e., six days prior to the order of attachment before judgment, however, the said Sale Deed was registered only on 10.1.1992, which according to the decree holder, after service of order of attachment before judgment and suit summons to the judgment debtor.

14. Admittedly, the said Sale Deed at Ex.R-2 remained an unregistered document with respect to the

sale of immovable property from judgment debtor to a third party till 10.1.1992, prior to which, there was already an order of attachment before judgment with respect to the very same property passed on 8.1.1992.

15. By virtue of amendment to Section 64 of CPC in the form of insertion of Section 64(2) of CPC, which came with effect from 1.7.2002, an exception from Section 64(1) of CPC, making a private alienation of property after attachment as void, was given only to those contracts for transfer which were made earlier to the order of attachment and also required that those contracts must be registered.

The Hon'ble Supreme Court in ***Salem, Advocate, Bar Association, Tamil Nadu, -vs- Union of India,*** reported in ***AIR 2005 SC 3353***, at paragraph-26 was pleased to observe as below :

" Section 64(2) in the Code has been inserted by Amendment Act, 22 of 2002. Section 64, as it originally stood, has been renumbered as Section 64(1). Section 64(1), inter alia, provides that where an attachment has been made, any private transfer or delivery of property attached or of any interest therein contrary to such attachment shall be void as against all claims enforceable under the attachment. Sub-section (2) protects the aforesaid acts if made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment. The concept of registration has been introduced to prevent false and frivolous cases of contracts being set up with a view to defeat the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid, if it is unregistered, the subsequent sale after attachment would not be valid. Such sale

would not be protected. There is no ambiguity in sub-section(2) of Section 64.

However, in **Vannarakkal Kallalathil Sreedharan's** case (*supra*), the facts are not indicative whether the agreement for sale of land which was entered prior to the attachment of land in execution of decree was a registered agreement of sale. However, the facts in **D.L.Sridhar's** case (*supra*) reveals that the agreement of sale dated 19.4.1990 in the said case was a registered agreement of sale, which subsequently culminated into a Sale Deed on 5.12.1990. Thus, noticing that the subject matter property though was suffering an order of attachment passed by the Court, still, the agreement of sale being prior to the said order of attachment, that too, under a registered document, the Court held that the alienation prevailed over the attachment. In the case on hand, admittedly the

alleged contract of sale dated 2.1.1992 was not a registered document.

16. Apart from the above, in Regular Appeal No.68/2004, filed by the subsequent purchaser who is the 1st respondent herein, before the First Appellate Court, the said Court has framed *inter alia* point No.1 for its consideration as below :

" 1. *Whether the impugned attachment order before judgment in respect of suit schedule property prevailed on the alienation of suit schedule property by Judgment Debtor No.2 in favour of RW.2 and appellant herein?*

The First Appellate Court in its reasoning on the said point after analysing the evidence placed before it and more particularly, considering the admissions made by RW-2, the vendor to the appellant before it, held that the Sale Deed at Ex.R-2 was executed and registered on

10.1.1992, but, not on 2.1.1992. It also observed that, if at all there was any execution of Sale Deed on 2.1.1992 itself, the said Sale Deed should have been registered either on the same day or the next day. With this, it observed that those facts probablise that RW-2 and judgment debtors 1 and 2 in collusion with each other, might have created Ex.R-2 with ante-date to avoid the impugned attachment. It is with said observation, the First Appellate Court answered the said point No.1 in the affirmative, holding that the impugned attachment order before judgment prevailed on the alienation of the suit schedule property by judgment debtor No.2 in favour of RW-2 and the appellant before it. The said finding having not been challenged by the judgment debtors and the purchasers of the subject matter property, the said finding has reached its finality. Even though the decree holder has challenged the order of the First Appellate Court passed in RA.No.68/2004,

dated 19.9.2008, but, his challenge is confined only to the finding of the First Appellate Court on point No.2 which held that the attachment order before judgment ceased to subsist by virtue of dismissal of Execution No.312/1993. Therefore, it is clear that both the contract of sale under Ex.R-2 and Ex.R-3 since being made during subsistence of the order of attachment before judgment, the said order of attachment before judgment in respect of the subject matter property prevails on the alienation of the said property by judgment debtor No.2 in favour of RW-2 and thereafter, from RW-2 to respondent No.1 herein.

17. From the above finding, though it is held that the order of attachment before judgment passed in O.S.No.41/1992 prevail over the Sale Deeds at Ex.R-2 and Ex.R-3, still, it cannot be forgotten that the matter that has culminated into this appeal is upon the order of

the Executing Court made on IA.No.4, filed by the purchaser of the property under attachment from its vendor RW-2 (Dorai Raju), who in turn, had purchased the said property from judgment debtor No.2 during the subsistence of the order of attachment before judgment. The said subsequent purchaser of the property Smt.Lakshamma (respondent No.1 herein) had filed an interlocutory application No.4 under Order XXI Rule 58 of CPC in the Executing Court, praying to release the execution schedule property from attachment in Execution No.127/1999.

Undisputedly, the said execution schedule property was under the order of attachment before judgment in O.S.No.41/1992. After the decree of said suit in favour of the plaintiff, Execution No.312/1993 came to be filed by the decree holder. As such, by virtue of Order XXXVIII Rule 11 of CPC, there was no need for the

decree holder to obtain re-attachment of the very same property in Execution No.312/1993. However, the said Execution No.312/1993 came to be dismissed for technical reasons on 2.3.1996. It is thereafter the decree holder has filed another execution case in Execution No.127/1999. Admittedly, no fresh order of attachment of the execution schedule property was passed in said Execution No.127/1999. It is in said Execution No.127/1999, the 1st respondent herein had filed the said IA.No.4 for release of the execution schedule property from attachment. As such, even though the First Appellate Court held that the alleged Sale Deed at Ex.R-2 though shown to have been come in to existence on 2.1.1992, but, in fact, it was made and executed only on 10.1.1992, as such, the attachment prevails over the said property, still, it held that the order of attachment before judgment has ceased by the dismissal of Execution No.312/1993. It

further held that since the impugned attachment ceased to subsist, question of release of attachment does not arise. It is this point which has been agitated by both side in this appeal.

18. Learned counsel for the appellant/decree holder in his argument vehemently submitted that Order XXI Rule 57 of CPC applies only to those order of attachments passed in execution of a decree and that the said Rule has no application with respect to those orders of attachments made before judgment. Since, in the instant case, the order of attachment before judgment was made in the original suit, but, not in the execution case, Order XXI Rule 57 of CPC has no application. In his support, learned counsel relied upon a judgment of learned Single Judge Bench of this Court in ***Sri Kanthilal -vs- Smt.Padma Maiya and others,*** reported in ***ILR 1999 KAR 2114,*** wherein the learned

Single Judge Bench of this Court after referring to various judgments of different High Courts and also of Hon'ble Supreme Court and more particularly, a judgment of this Court in ***Byrappa by L.Rs. Smt.Munisanjivamma and others -vs- S.Mani and others, reported in AIR 1970 Mysore 153,*** was pleased to hold that the powers of the trial Court is certainly superior to that of the Executing Court and it cannot be said that further attachment in execution is necessary.

Per contra, learned counsel for respondent No.1 in her argument relied upon a judgment of learned Single Judge of this Court in ***Linga Bhatta alias Thammaiah and others -vs- M/s.Saravana Enterprises and another, reported in AIR 2003 KAR 128,*** wherein the learned Single Judge was pleased to hold that, to discriminate the attachment obtained before judgment

under Order XXXVIII Rule 5 of CPC as a separate category and to make the provisions of Rule 57 of Order XXI of CPC inapplicable does not stand to reason. When once an execution case is dismissed, the order of attachment made, if any, does not get revived.

It is in the above said two contrary finding of this Court on the same question of law, the point has to be analysed. Order XXI Rule 57 of CPC reads as below :

"57. Determination of attachment:-

(1) Where any property has been attached in execution of a decree and the Court, for any reason, passes an order dismissing the application for the execution of the decree, the Court shall direct whether the attachment shall continue or cease and shall also indicate the period upto which such attachment shall continue or the date on which such attachment shall cease.

(2) If the Court omits to give such direction, the attachment shall be deemed to have ceased.

The said Order XXI Rule 57 of CPC was analysed by a Single Judge Bench of this Court in **Byrappa's** case (*supra*). The learned Single Judge of this Court has held as follows :

" The words "where any property has been attached in execution of a decree" in the rule should not be interpreted too literally. They have to be understood as referring to an attachment in enforcement of which the decree could be executed and in the case of an attachment before judgment it is that attachment which assumes the character of an attachment in execution of a decree and so becomes capable of enforcement in an execution proceeding.

The rule thus governs not only an attachment made in execution proceedings

but also an attachment before judgment. Whether, therefore, it is an attachment before judgment which becomes an attachment in execution or whether it is an attachment made in execution proceeding that attachment ceases to subsist under the rule when an execution application is dismissed for decree-holder's default."

However, another learned Single Judge of this Court after referring to **Byrappa's** case (*supra*), in his judgment in **Kanthilal's** case (*supra*), at Paragraph-28, was pleased to observe as below :

" Para-28 : In the light of the above dictum, it cannot be said that further attachment in execution is necessary. The power of the trial Court is certainly superior till that of the executing Court, as the latter merely carry out the order or decree of the former Court. Once it is seen that no further attachment is necessary for bringing the

property to sale in execution, the attachment effected, even if it is so, is only a redundant. If at all the redundant attachment will alone go, with the dismissal of the execution application. But, the earlier attachment before judgment subsists for ever. Order 21 Rule 58 CPC does not give the power to the executing Court to annul the attachment made by the trial Court, a fairly superior Court and the executing Court has no jurisdiction even to go into attachment made before judgment by the decree Court and in the light of the above dictum, the attachment and the property, once form into an integral part of the decree, that the executing Court cannot go beyond the decree at all. That being the settled law, the argument of the learned Counsel for the respondent the attachment ceased cannot be entertained nor such finding rendered by the trial Court can be sustained. Therefore, that finding regarding the validity of the attachment is set aside

and the attachment before judgment is held to be valid."

19. It appears that **Kanthilal's** case (*supra*), was not referred before another learned Single Judge in **Linga Bhatta's** case (*supra*), wherein a similar question was under consideration, however, **Byrappa's** case (*supra*) was referred. After referring few more cases placed before it, the learned Single Judge at Paragraph-9 of the judgment, was pleased to observe as below :

" It appears to me that it is proper and reasonable to say that Rule 57 of Order 21, which causes the disappearance of an attachment when an execution application is dismissed for the default of the decree-holder governs not only an attachment made in an execution proceedings but also an attachment before judgment which becomes an attachment in execution when

a decree is made in the suit in which the attachment before judgment is made.”

20. In the same case, learned Single Judge after relying upon the judgment of the Division Bench of this Court in ***The Vijaya College Trust -vs- The Kumta Co-operative Arecanut Sales Society Limited and another***, reported in ***AIR 1995 KAR 35***, was pleased to hold at Paragraph-12 as below :

“ After carefully going through the rulings, the material provision of Order 21 and Order 38 in the light of undisputed facts, I find that to discriminate the attachment obtained before judgment under Order 38, Rule 5 as a separate category and to make the provisions of Rule 57 of Order 21 inapplicable does not stand to reason. This Court in AIR 1970 Mysore 152 and in Vijaya College Trust’s case has taken a view that the provisions of Rule 57 also apply to case of attachment before judgment.”

21. A bare reading of Order XXI Rule 57 of CPC, no doubt gives an impression that the attachment referred therein is with respect to an order of attachment made in execution of a decree i.e., in a execution case. However, when the said Rule is read with Order XXXVIII Rule 11 of CPC, which says that where the property is under attachment by virtue of Order XXXVIII of CPC and a decree is subsequently passed in favour of the plaintiff, but, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property. Thus, the order of attachment before judgment passed in the suit after decree of the said suit in favour of the plaintiff would continue in the execution petition. However, Order XXXVIII Rule 11-A of CPC plays an important role here. The said Rule reads as below :

" Rule 11-A. Provisions applicable to attachment.- (1) *The provisions of this Code applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule 11.*

(2) *An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored."*

A reading of the above Rule 11-A of CPC, makes it clear that the provisions of the CPC applicable to an attachment made in execution of a decree applies to an attachment made before judgment which continues after the judgment by virtue of the provisions of Order XXXVIII Rule 11 of CPC. By virtue of Rule 11-A of CPC,

the Legislature has made it clear that the provisions relating to attachment made in execution of a decree is also made applicable to the attachment before judgment. As such, an order of attachment before judgment passed during the pendency of the suit, after the said suit decreed in favour of the plaintiff continues to be an order of attachment in execution case. The said continuation of order of attachment has to be treated by virtue of Order XXXVIII Rule 11-A of CPC in the same manner as an order of attachment made in execution of a decree under Order XXI of CPC. In such a case, by virtue of Order XXI Rule 57 of CPC, the order of attachment determines at the dismissal of application for the execution of the decree unless a specific order is made by the Executing Court about the continuation of the order of attachment and the period of its continuation.

22. In the present case, admittedly the order of attachment was an attachment before judgment passed during pendency of the suit in O.S.No.41/1992. After the said suit came to be decreed in favour of the plaintiff, the said order of attachment before judgment was accruing to the benefit of the decree holder in his Execution Case No.312/1993. To execute the said order of attachment, there was no necessity for the plaintiff to file a fresh application seeking re-attachment of the very same property by virtue of Order XXXVIII Rule 11 CPC. However, the said order of attachment since has to be considered in execution like an order of attachment made in execution by virtue of Order XXXVIII Rule 11-A of CPC, the said order of attachment came to be ceased by virtue of Order XXI Rule 57 of CPC on 2.3.1996 when Execution No.312/1993 came to be closed without there being any express or specific order about the continuation of the order of attachment. Therefore,

I concur with the finding given by the learned Single Judge in **Linga Bhatta's case** (*supra*) and hold that in the instant case, the order of attachment passed in O.S.No.41/1992 by the trial Court has been ceased by the dismissal of Execution No.312/1993 without any order regarding continuation of the attachment order, as such, advantage of order of attachment before judgment passed in OS.No.41/1992 was not available to the decree holder in his subsequent execution petition i.e., Execution No.127/1999. The finding of the lower Appellate Court on this point since being a reasoned one and in consonance with the above finding, I do not find any error or perversity in the said finding.

23. Accordingly, I answer substantial question of law No.1 in the affirmative and question No.2 in the negative. In view of the finding of the First Appellate Court that the Sale Deed dated Ex.R-2 was executed not

on 2.1.1992, but on 10.1.1992, which was after the order of attachment before judgment was passed on 8.1.1992, the other substantial question of law becomes redundant. With these findings, I proceed to pass the following order :

ORDER

The Regular Second Appeal is ***dismissed***. The judgment and decree dated 19.9.2008, passed by the Addl. Civil Judge (Sr.Dn.) & CJM, Mandya, in R.A.No.68/2004 is hereby confirmed.

In the circumstances of the case, there is no order as to costs.

**Sd/-
JUDGE**

bk/-