

ORDER ON IA NO. II

This application has been filed by the decree holder under Order XXI Rule 46 (A to F) of CPC, praying to issue notice to Garnishee Sri Shashishekar, to appear before the Court.

In the affidavit annexed to the IA it is stated that, this execution petition has been filed on the Judgment and Decree passed in O.S. No.25390/2020. After filing of this execution petition, attachment warrant of movables of JDR has been ordered. In response to which, JDR has appeared and filed Vakalath, but has not made any payment. Hence, application was filed to issue arrest notice to JDR and since she is a lady, same was not issued. T.P. Shashishekar is the son of JDR, who represented the JDR in O.S. No.25390/2020, who had entered into an agreement of sale on 30.01.2017 and he is solely responsible for the execution of sale deed to a third party. During the subsistence of agreement of sale, executed in favour of decree holder, he had received entire consideration amount and said amount is with his custody and hence, sought to issue notice to him.

In support of the case of the decree holder he had submitted a citation reported in **M/s. Sundaram Bnp Paribas Home Vs. Mr.Mir Ali, dated 3rd January 2012**. The High Court of Judicature,

of Madras, wherein the Judgment of Hon'ble Apex Court in Adhunik Steels Limited in Manu/TN/2871/2011{A-1BIZ solutions cheenai Rep. By its Chief Executive Officer Ujwal Rao V. Cascade Billing Center Incorporated has been relied upon, wherein it is elaborately discussed and held that,

“Therefore, it is evident from the decision of the Honourable Supreme Court that wherever the powers of the Court are invoked with the objective of supporting the arbitration, the Courts must act cautiously. The Court would not be justified in granting interim orders and relief merely for the asking of it. In fact, if a similar analogy is worked out in case of attachment of immovable property and seeking security under [Order 38 Rule 5 of Code of Civil Procedure](#), the Honourable Supreme Court as well as this Court have time and again held that the intention of the parties to deprive the other party from enforcing the decree should be manifestly clear, pleaded, proved and orders of attachment cannot be granted as a matter of routine. The same principle will also apply to the cases governing [Section 9](#) of the Act.”

Further in the decision referred by decree holder it was clearly discussed regarding Section 46A notice to garnishee, which is as under:-

46A. deals with Notice to garnishee.-

(1) The Court may in the case of a debt (other than a debt secured by a mortgage or a charge) which has been attached under rule 46, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt, calling upon him either to pay into Court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to

satisfy the decree and costs of execution, or to appear and show cause why he should not do so.

Thus as per Order 21, Rule 46A CPC, garnishee notice could be issued only “in respect of the debt other than the debt secured by the mortgage or charge”. As pointed out earlier, in the case on hand, loan amount is secured by mortgage and therefore, Appellant cannot seek for prohibitory order against the garnishee.

Under Order 21, Rule 46A CPC, Court may issue notice to garnishee in case of debt which has been attached under Order 21, Rule 46 CPC. Order 21, Rule 46 CPC deals with “attachment of debt, share and other property not in possession of judgment -debtor”. Order 21, Rule 46 CPC reads as under:-

“R.46. Attachment of debt, share and other property not in possession of judgment-debtor.-(1) In case of

- (a) a debt not secured by a negotiable instrument,
- (b)
- (court).....”

Thus there can be attachment of debt, share and other property not in possession of the judgment-debtor and only in case of “debt not secured by a negotiable instrument”.

Hence, Court can issue notice to garnishee only when debt which has been attached under Order 21 Rule 46 CPC. That too only when debt is due from him to the Judgment Debtor. Moreover, in the above citation, Court has rejected the application of appellant on the ground that filing of application under Section 9 of Arbitration and Conciliation Act, appears to be an arm- twisting tactics to bring

pressure upon the 1st Respondent. Therefore, above citation noway helps the decree holder. Moreover, Judgment in O.S. No.25390/2020 has been passed declaring that plaintiff is entitled to recover sum of Rs.77,00,000/- with interest at the rate of 12% per annum, from the date of sale agreement, till its realization from the defendant. The property referred by the decree holder neither attached in the suit nor in this proceedings or the JDR is in possession of the same. Further, as already discussed supra, he is not due of any debt to the JDR.

Under this circumstance, I opine that, above application is not maintainable. Hence, proceed to pass the following :-

ORDER

IA No.II filed by the decree holder under Order XXI Rule 46 (A to F) of CPC, is hereby rejected.

Principal District & Sessions Judge,
Mysuru.

