

ORDER

Dated 29.04.2025

1. This petition has been filed under Order XXI Rule 58 of C.P.C. by the petitioner seeking to stay the sale of the scheduled properties in the petition.

2. The petition filed by the petitioner under Order XXI Rule 58 of C.P.C. was returned by this Court and this Court returned the petition for the reason that the execution proceedings is pursued, not on the basis of attached property. The petition was represented by the petitioner with the reason mentioning that the petition under XXI Rule 58 is maintainable, since no formal of order of attachment will be passed prior to sale. The respondent also has endorsed that the petition is not maintainable, since there was no attachment. In the above circumstances, the counsel for the petitioner was heard and the learned counsel has relied on the stand specified in the reply for the query raised in the return of the petition.

3. The execution proceedings under E.P.No.194 of 2024 is filed in lieu of the judgment and decree of this Court dated 15.03.2024 in which the Court has passed the decree by creating charge over the suit property till the realization of the decretal amount.

4. This Court would consider that Order XXI Rule 58 of C.P.C. would apply only when the immovable property included in the execution proceedings is attached by this Court. In this regard, this Court would find it appropriate to refer the judgment of Hon'ble High Court in **M.S.Doraisami Iyer Vs A.R.Arunachalam Chettiar and others** reported in **AIR 1991 Madras 275**, in which the Hon'ble High Court has held as follows:-

“7. This Civil Miscellaneous second appeal can be dismissed on a very short ground that the application filed by the appellant in the executing Court was itself not maintainable. The application is one under Order 21, Rule 58, C.P.C. No such application can be maintained in a proceeding in execution of a mortgage decree. Rule 58 of Order 21, C.P.C. can come into play only when there is an attachment. In the case of mortgage there is no question of attachment and in this case, there was no attachment as such. Consequently, the application was not maintainable. The appeal by the appellant before the lower Appellate Court was also not maintainable.”

5. This Court has passed the Charge Decree. The main suit has been filed for the relief of specific performance. In case of transactions taken place between the parties on the basis of sale agreement statutory charge under Section 55 (4) (b) and 55 (6) (b) is created. In this regard, the Hon'ble High Court in the

judgment K.Shanmugam vs C.Samiappan, reported in 2013 (6) CTC Page 28 in paragraphs No.20 to 23 has referred to dictum laid by the Hon'ble Supreme Court in **(1) Videocon Properties Ltd., Vs. Dr.Bhalchandra Laboratories and others** reported in (2004) 3 Supreme Court Cases 711, **(2) Delhi Development Authority Vs. Skipper Construction Co. (P) Ltd., and others** reported in 2000(I) CTC 507, regarding the creation of statutory charge and this Court would consider appropriate to refer the following portion in paragraph No.22 of the judgment of Hon'ble Madras High Court.

“.... It is plain from the above provision that, in the absence of a contract to the contrary, the buyer will have a charge on the seller's interest in the property which is the subject matter of the sale agreement insofar as the purchase money and interest on such amount are concerned, unless the buyer has improperly declined to accept delivery. The charge is available against the seller and all persons claiming under him. This charge in favour of the buyer is the converse of the seller's charge under Section 55(4)(b). The buyer's charge under this Section is a statutory charge under Section 55(4)(b).....”

6. From the above position of law laid down by the Hon'ble Supreme Court in the judgments referred in paragraph No.5, once the charge created is defined as statutory charge. The provision of Section 100 of Transfer of Property Act

would apply and the charge created would be construed as charge by operation of law and the charge has to be treated as simple mortgage. When the provision under Section 100 of Transfer of Property Act comes into play, the provisions of Order 34 Rule 15 will also be attracted.

7. Apart from the above statutory charge, this Court has also passed the charge decree with the following terms:-

“ (3) that for the compliance of the above clause (2), the charge is hereby created over the below mentioned suit property till the realization of the said amount”

8. During the submission the learned counsel for the petitioner has submitted that the property cannot be brought for sale in an execution proceedings without order of attachment. But, in this regard this Court would consider appropriate to refer the judgment of Hon'ble High Court in **D.V.Athisayaraj Vs Tirunelveli Diocese Trust Association**, reported in **2005 (4) MLJ 404** in paragraph No.26 the Hon'ble High Court has referred to the provision under Section 51(b) of the C.P.C. and held that a property of a judgment debtor can be brought for sale even without attaching the property.

9. When this Court has referred to the judgment of Hon'ble Supreme Court and Hon'ble High Court referred supra and when applied the same to the facts of

the present represented petition, this Court would consider that the charge has been created over the suit property by the decree of Court and the statutory charge is also attracted as per Section 100 of the Transfer of Property Act towards the suit property. Hence, this Court is of the view that the attachment of the property in this execution proceedings was not necessary and proceeded for to effect the sale in the execution proceedings without attachment. In the above circumstances, this petition under Order XXI Rule 58 has been filed, since there is no attachment of property involved in the proceedings, by relying on the judgment of Hon'ble High Court in **M.S.Doraisami Iyer Vs A.R.Arunachalam Chettiar and others** this Court is of the considered stand that the petition under Order XXI Rule 58 of C.P.C. is not maintainable and considers that the petition is liable to be rejected.

10. In the result the petition filed under Order XXI Rule 58 of C.P.C. by the petitioner is not maintainable and is rejected.

sd / Tr. K.Hariharan, M.L.,
Judge,
Commercial Court,
(District Judge Cadre)
Coimbatore