



applicant/plaintiff by executing a promissory note and a receipt against the said loan dated 28.01.2005, on which revenue stamps were affixed and signed by the respondent No. 1 on 02.03.2005 and condition of loan was that the same would be returned to the applicant /plaintiff as and when demanded by him.

4. It is further contended by the learned counsel for the applicant/plaintiff that on his demand to return of said loan, the respondent No. 1 issued two cheques of Rs.300,000/= and Rs.2,50,000/= dated 30.4.2006 drawn at Bank Al-Falah Limited, Stock Exchange Branch, Karachi, but on presentation in the Bank both the said cheques were dis-honoured by the Bank on the ground that funds were not arranged.

5. It is contended that applicant again demanded his loan back from respondent No. 1, but he refused to pay back his amount, hence he filed summary suit against respondent No. 1 and alongwith the plaint in Summary Suit No.05/2006 moved an application under order XXXVII Rule 5 CPC for attachment of property of respondent No.1/judgment debtor before judgment i.e. Bungalow No. B-37, Gulshan-e-hadeed, Phase-1 Bin Qasim, Bata More, Super Khyber Store, Malir Karachi and also prayed that alternatively the respondent No.1 may be directed to furnish security matching the value of the suit. The said application was not granted by the learned trial court on the ground that judgment will be announced soon.

6. It is further submitted by the applicant/plaintiff that trial court issued notices to Respondent No.1 but the same could not be served as the Respondent No.1 was avoiding to receive the same. Thereafter on 09.03.2007 summons of the suit were published in Daily Urdu Newspaper "Nawa-e-Waqt, Karachi". After publication Respondent No.1 moved an application for leave to defend the suit unconditionally. Leave to defend application was resisted by counter-affidavit of the applicant/plaintiff.

7. Learned counsel for the applicant has candidly argued that the trial Court has passed judgment and decree dated 28.4.2007 in favour of the applicant/plaintiff and against the Respondent No.1 on the ground that the application filed by respondent No. 2 for leave to defend the suit was not filed within statutory period of 10 days from the service of notice.

8. It is contended that subsequently the applicant filed execution application before the Executing Court, which was admitted and numbered as Execution Application No. 1/2007. Notice of the execution application was issued against respondent No. 1/judgment debtor through ordinary mode, but Respondent No.1 again avoided to receive the notice, eventually notices were published in two daily newspapers namely "The News (International edition)" and daily "Nawa-e-Waqt", Karachi.

9. It is further contended that after publication, Respondent No.2 appeared before the Executing Court through his Advocate and filed objections in the said execution application, wherein the Respondent No.2 /Objector requested the Court not to attach or sale the property mentioned in Execution application as he has purchased the same from Respondent No.1. Applicant filed objection to the said objections of respondent No. 2.

10. Per learned counsel for the applicant/Decree Holder, he has pointed out before the Executing Court that the alleged sale transaction was a collusive act of the judgment debtor/respondent No. 1 with hands in glove with so called respondent No. 2/objector, which is nothing but a trick being played by the judgment debtor/respondent No. 1 in order to defeat the very purpose of execution application and to resist the applicant/decree holder from obtaining the fruits and benefits of the decree. It was further pointed out by the learned counsel for the applicant/decree holder to the learned Executing Court that the proceedings of the summary suit which resulted in the passage of decree was in the knowledge of the judgment debtor/respondent No. 1 and subsequent

proceedings of the execution application were also in his (respondent No. 1) knowledge as the bailiff report revealed that notice of execution application was received by one Shahzad on 02.06.2007, who identified himself to the bailiff that judgment debtor/respondent No. 1 is his uncle and after consulting with the daughter of the judgment debtor/respondent No. 1, he (Shahzad) received the notice of execution application under his own signature on the office copy of the notice. Before that on 31.5.2007 the bailiff attempted to serve the notice upon judgment debtor/respondent No. 1 but his daughter narrated that the judgment debtor/respondent No. 1 is not available at home.

11. Continuing his arguments learned counsel for the applicant/decree holder stated that as a precautionary measure, the applicant/Decree holder informed and requested the concerned Sub-Registrar that until the satisfaction of the decree, the sale of judgment debtor's house being subject matter of the execution proceedings not to be transferred in the name of any person. On 09.09.2008 execution application of the applicant/Decree holder was disposed off on the ground that the property mentioned in the execution application belonged to objector, resultantly it could not be attached, the applicant/Decree holder was, therefore, directed to provide the particulars of other property of judgment debtor/respondent No. 1 for satisfaction of the decree.

12. The learned counsel for the applicant/Decree holder further argued that section 55 of the transfer of property Act deals with the liabilities of buyer. The counsel for applicant/Decree holder in this regard relied upon 2000 C.L.C. 1425 @ ( C ), wherein it was observed that, if the transaction is on collusion, the same is not sustainable as order XXI rule 58 of C.P.C provides the transaction be in good faith. The learned counsel for the applicant/Decree holder has further argued that the Hon'ble Supreme Court of Pakistan has observed in 2004 S.C.M.R 971 the difficulties and agonies being faced by the poor litigants after obtaining the decree in a case.

13. Conversely, the learned counsel for respondent No. 2/objector has argued that the applicant in his Execution Application No. 01 of 2007 has wrongly and malafidely pointed out property of respondent No. 2, bearing property No. B-37, Gulshan-e-Hadeed, Phase-1, Malir Karachi, to usurp the same illegally, by way of attachment, instead of any other property owned by respondent No. 1, and too without respondent No. 2's knowledge. She further argued that after acquiring knowledge about said execution application/proceedings, respondent No. 2, within shortest possible time joined the said proceedings by filing his objections in the said execution application of applicant. Learned counsel for respondent No. 2/objector argued that the above said property has no concern with the judgment debtor and the decree holder has given absolutely wrong pointation of above said property, as the objector (respondent No. 2) is lawful and bonafide owner of above said property and had purchased by respondent No. 2 objector Gul Muhammad Pathan from Judgment Debtor/Respondent No.1 on 21.4.2007 in the sum of Rs.41,50000/- and while entering into sale agreement with him, a duly registered sale deed was also executed in favour of respondent No.2 on 09.06.2007. She further argued that the said Execution Application was filed by decree holder on 29.05.2007, after sale/purchase transaction between the objector/respondent No. 2 and judgment debtor, (the respondent No. 1). She argued that the objector/respondent No. 2 will suffer irreparable loss if the above property is attached and sold, therefore, directions may be issued to applicant/decreed holder to give accurate identity of property exclusively belonging to the judgment debtor/respondent No.1 or adopt the mode of arrest of judgment debtor. She argued that the respondent No. 2/objector is the bonafide and lawful owner of the property in question and the learned Executing Court was well within its legal competency and very rightly disposed of the said execution application of the applicant by exonerating the property in question of respondent No. 2 and directing the applicant/decreed holder to identify any other property owned by respondent No. 1/judgment debtor.

14. After hearing arguments, perusal of the record, relevant laws and case laws relied upon by the learned counsel for the applicant/decreed holder, it is comprehended that the plea raised by the learned counsel appearing on behalf of the respondent No. 2/objector is that he had purchased the property from respondent No. 1 on 21.04.2007 before filing of Execution Application by the applicant/decreed holder on 29.5.2007, through entering into sale agreement with respondent No. 1 and then a duly registered sale deed was executed in favour of the respondent No. 2 on 09.06.2007. The claim of applicant/decreed holder against such sale transaction is that the alleged sale transaction was a collusive act of the respondent No. 1/judgment debtor with hands in glove with respondent No. 2/objector. In this regard I have gone through the relevant provision of law provided in order XXI Rule 54 of C.P.C. Before discussing this provision of law, I would like to reproduce below the Order XXI Rule 54 of C.P.C:-

#### **Order XXI Rule 54 C.P.C**

***54. Attachment of immovable property. – (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.***

*(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the government, in the office of the Collector of the district in which the land is situate.*

15. The object of the Rule 54 of Order XXI of CPC in prescribing a particular way of notifying the attachment is to give notice to the judgment debtor not to alienate his property and to the public not to accept any alienation from him. The procedure under the rule has been provided for, in order to safeguard the interest not only of the decreed holder but also of the purchaser.

16. The objector's plea that he is a bonafide purchaser as the property in question was purchased on 21-04-2007 through sale agreement, while the applicant /decree holder has filed the execution application on 29-05-2007 and sale deed was executed in his favour on 09-06-07. In order to ascertain bonafide of the respondent no.1/judgment debtor and respondent no.2/objector, I have gone through the record, which revealed that on 09-10-2006 the applicant/decree holder has submitted an application under order XXXVII Rule 1 & 2 CPC and just after that he has also filed an application under Order XXVII Rule 5 CPC duly supported by the affidavit of the applicant/decree holder, whereby, he has mentioned with clarity that "the respondent No.1/judgment debtor with intention to obstruct or delay the execution of the decree which may be passed against him in the above matter is going to dispose of his property description of which has been given in the case title and that it is the only property which match the value of the suit being owned by the respondent no.1/defendant and with the disposal of such property, the applicant/decree holder shall suffer irreparably. It is apprehended that the process of this Court may get obstructed as the execution of decree which may be passed against the respondent No.1/defendant shall be frustrated as (judgment debtor) have definitive information revealed by a close friend that the respondent No.1/defendant having above stated intentions is going to dispose of such property.

17. Notice of this application of the applicant/decree holder was also sent to the respondent No.1/judgment debtor and was served with the notice of trial Court and then he appeared and moved an application for leave to defend, which was not allowed, but the learned trial Court has also not allowed the application of the applicant /decree holder for attachment before judgment, however, through the above discussed proceedings, it became evident to respondent No. 1/judgment debtor that in case of judgment in favour of the applicant/decree holder, his property mentioned in the application would be attached. When the judgment & decree were passed in favour of the applicant/decree holder, he in apprehension as discussed above again provided the details of the same property owned by the

respondent no.1/judgment debtor for attachment. Since it already came in the knowledge of the respondent No.1/judgment debtor through the application of the applicant/decree holder filed by him under Order XXXVII Rule 5 of the CPC that applicant/decree holder intended to get his property attached, therefore, in anticipation of judgment, he hurriedly entered into a sale agreement dated 21-04-2007 just six days before the judgment which was passed on 28-04-2007, however, its sale deed was executed by the respondent no.1/judgment debtor in favour of respondent no.2/objector on 09-06-2007, while execution application was filed by the applicant/decree holder on 29-05-2007, meaning thereby that at the time of submission of execution application, sale deed was not executed between both the respondents. It has already been discussed above that the respondent no.1 was fully aware that in case of pronouncement of judgment & decree in favour of the applicant/decree holder, his property in question would be attached, therefore, he malafidely arranged the sale of his property to the respondent no.2/objector, so that he may defeat the judgment & decree of the Court.

18. The learned Counsel for the applicant/decree holder had also sent a legal notice to the concerned Sub-Registrar on 11-07-2007, wherein, he informed the Sub-Registrar regarding the Summary Suit decreed and filing Execution Application before Executing Court regarding attachment of the house owned by the respondent No.1/judgment debtor. However, it appears that sale deed was executed between both the respondents No.1 & 2 on 09-06-2007 while the letter mentioned above was sent on 11.07.2007 i.e. after the execution of sale deed.

19. Now the question is that who can prefer claim? In this regard I have gone through the Order XXI Rule 58 of C.P.C which deals with the cases of those persons who on the date of attachment have some interest in, or are possessed of the property attached, can prefer claims under this rule. In the instant case the respondent no.1 /judgment debtor was in possession of the said property for which the applicant/decree holder filed an application under order XXXVII Rule 5 CPC for



its attachment before judgment in the suit filed under order XXXVII Rule 1 & 2 of C.P.C by the applicant /decree holder against the respondent no.1/judgment debtor. It transpired that Respondent No.1/judgment debtor was fully aware of the intention of the applicant/decree holder that in case of decree of his suit in favour of applicant, he (applicant/decree holder) definitely would bring this property under execution proceedings for attachment. He became more vigilant to keep the said property secured when his application for leave to defend was dismissed being time barred. It was the time when Respondent No.1/Judgment debtor was quite sure that applicant/decree holder would try to get attachment of his property in execution of the decree dated 28-04-2007, therefore, on 21-07-2007 knowingly and deliberately entered into sale agreement with the respondent no.2/objector and after 11 days of filing of execution application i.e. on 29-05-2007, he executed sale deed on 09-06-007 in favour of respondent no.2/objector, wherein one of the witness namely Shahzad Ahmed was the same person who had received the notice of execution application of the applicant/decree holder from bailiff on behalf of the respondent No.1 at his residence yet the respondent No.1 deliberately avoided to join execution proceedings, rather he created third party interest in the property in question after his failure to frustrate decision passed in favour of the applicant/decree holder and in order to remain in illegal possession of the property and collusively managed to file objections through respondent No.2/objector. Since from the acts of the respondents No.1 & 2, it appears that respondent No.1/judgment debtor and respondent No.2/objector were in league with each other in attempting to save the property in question from being attached and is sold in execution, therefore, I set aside the impugned order 09-09-2008 as the learned Executing Court has failed to exercise a jurisdiction vested in it and instead of determining the question of possession the learned trial Court dealt with the question of title and disposed of the execution application on the question of title. Simultaneously I allow the execution application No.01/2007 as prayed, passed by the learned trial Court on 28.04.2007 for satisfaction of the decree. The learned trial Court/Executing Court is directed to complete the attachment

proceedings of the property of the respondent No.1/judgment debtor, sold out by him to the respondent No.2/objector with malafide intention in order to defeat the decree of the Suit No.08/2006, after giving the notices to all parties concerned.  
Order accordingly with no order as to cost.

\*Faheem/PA\*

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