

**STATE OF KERALA
IN THE SUBORDINATE JUDGE'S COURT, ERNAKULAM**

**Present :
Manjith.T. Additional Sub Judge – I**

Friday, the 18th day of March, 2022/ 27th Phalguna, 1943

IA No.02/2021 in O S No.02/2021

Petitioners/Plaintiffs:

1. Joby Antony, aged 54 years, S/o.S.J.Antony, Sankoorikal House, Njarackal, Pin-682 505, permanently residing at No.62, near Shooting Bungalow, behind Wida School Bus Stop, Nagasundra Post, Bangalore-560073.
2. Manju Joby, aged 47 years, W/o.Jobby Antony, Sankoorikal House, Njarackal, Pin-682 505, permanently residing at No.62, near Shooting Bungalow, behind Wida School Bus Stop, Nagasundra Post, Bangalore-560073.

By Advs. Denu Joseph, Saji Mathew, Bibin Babu

Respondent/Defendant:

Sajan Babu, aged 63 years, S/o.Vellassery Damodaran, Njarackal, Pin-682 505, permanently residing at Vellassery House, S.R.A.30, Santhi Nagar, Marottichuvadu, Edappally P.O., Kochi-682 024.

**By Advs.N.Retheesh,
Suma Retheesh**

Petition filed under Section 64, 151 r/w Order XXXVIII Rule 5 of the Code of Civil Procedure to pass an order directing the respondent/defendant, to furnish sufficient security for the plaint claim within a time frame, failing which to attach the property mentioned in the attachment schedule filed herewith and also to pass an order of conditional attachment of the scheduled properties and also to communicate the order to the concerned Sub Registrar Office and Village Office.

This petition coming on for hearing before me on 11.03.2022 and the Court on 18.03.2022 delivered the following :

ORDER

Petition filed under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908.

2. Petitioner's case, in brief, is as follows:-

On 27.05.2019, respondent executed an agreement for sale in favour of the petitioner with respect to the petition schedule property for a consideration of ₹9,00,000/- (Rupees nine lakh only) per cent and received ₹36,50,000/- (Rupees thirty six lakh fifty thousand only)

towards advance sale consideration. But, on 04.01.2021, the respondent demanded ₹12,00,000/- (Rupees twelve lakh only) per cent and refused to measure out and show the original title deeds of the petition schedule property. Since, the respondent committed breach of contract, petitioner, demanded return of aforementioned advance sale consideration. But, the respondent refused it. Now, the respondent, with an intention to obstruct or delay the execution of the decree that may be passed against him, is about to dispose of the petition schedule property for a lesser price. Thus, the petition.

3. Respondent's case, in brief, is as follows:- Respondent, who has always been ready and willing to perform his part of the contract, already measured out the property and is always ready and willing to show the original title deeds to the petitioner. But, the petitioner, who was unable to pay the balance sale consideration, committed breach of contract. All other contra allegations are false. Respondent, who has already returned ₹25,000/- (Rupees twenty five thousand only), in cash and cheque for ₹2,00,000/- (Rupees two lakh only) out of the advance sale consideration, is ready to return the balance amount of ₹27,15,000/- (Rupees twenty seven lakh fifteen

thousand only) after deducting ₹7,35,000/- (Rupees seven lakh thirty five thousand only), as per the default clause in the agreement for sale, towards damages. But, the petitioner, against his claim of ₹36,50,000/- (Rupees thirty six lakh fifty thousand only), attached the petition schedule property worth ₹81,83,700/- (Rupees eighty one lakh eighty three thousand seven hundred only). Thus, the respondent sought for the dismissal of the petition.

3. Exts.A1 to A6 were marked from the side of the petitioner.

4. Heard both sides.

5. Following points arise for consideration:-

1. Whether the petitioner has made out a prima facie case?

2. Whether the respondent, with an intention to obstruct or delay the execution of the decree that may be passed against him, is about to dispose of the petition schedule property?

3. Whether the petition schedule property is liable to be attached?

4. What is the order as to costs?

6. Point No.1:- For an order of attachment before judgment, petitioner should make out a prima facie case and the present intention of the respondent to dispose of the petition schedule properties to obstruct or delay the execution of the decree, which may be passed against him. In case of failure of prima facie case or the present intention as aforementioned, the relief of attachment before judgment will fail (see **Rajendran and Others V. Shankar Sundaram and Others ((2008) 2 SCC 724)** and **Skoda Auto India Private Ltd. V. St. Antony's Trading Company (2018 (1) KLT 558 (DB))**).

7. Prima facie case means, more than an arguable or triable case, the averments in the affidavit are supported by materials on record (see **P.Muthukoya V. M.Muthukoya (1988 (1) KLT 664 (DB))**).

8. Agreement for sale dated 27.05.2019 and payment of advance sale consideration of ₹36,50,000/- (Rupees thirty six lakh fifty thousand only) are admitted. Petitioner's case is that the respondent, who suppressed his sisters right over the petition schedule property and caused delay in obtaining release deed with respect to sister's right, refused to measure out the property and to show original title deeds to the mortgager bank of the petitioner,

demanding enhanced consideration of ₹12,00,000/- (Rupees twelve lakh only) per cent and thereby committed breach of contract. Respondent's case is that petitioner, due to financial incapacity, failed to pay the balance sale consideration within the agreed period and thereby, committed breach of contract. Thus, both sides blamed each other for the breach of contract.

9. No ordinary prudent man will enter into Ext.A1 agreement for sale without verifying the original title deeds. Exts.A2, the prior title deed of respondent, itself shows the right of respondent's sister over the petition schedule property. Thus there is no question of suppression of sister's right of the property. Ext.A1 agreement for sale itself recites that the petition schedule property is measured out and demarcated. Thus, the allegation of refusal to measure out the petition schedule property does not inspire confidence. No seller is bound to show his original title deeds before the mortgagor bank of the petitioner, especially when Ext.A1, did not mandate it. Whereas, Ext.A5, power home loan sanction letter dated 28.07.2020 for an amount of ₹32,91,684/-, is not upto the balance sale consideration of ₹45,33,700/-. Ext.A6, which is towards Universal Engineers in

Bangalore, did not relate to the petitioner in the absence of material to show petitioner's connection with the said institution. Under these circumstances, there is no material on record to show the readiness (capacity to perform contract) and willingness (intention to perform contract) on the part of the petitioner. Admission of petitioner as to the receipt of ₹25,000/- (Rupees twenty five thousand only) in cash and cheque for ₹2,00,000/- (Rupees two lakh only) from respondent, since no buyer will receive money from seller, coupled with the aforementioned circumstances prima facie probabalise the respondent's case. This point is found against the petitioner.

10. Point No.2:- Mere pendency of a suit or chance for its institution is not a ground to restrain a respondent from alienating or otherwise encumbering his property. So, the petitioner must, by cogent materials on record, show that the respondent, with an intention to obstruct or delay the execution of the decree that may be passed against him, is about to dispose of his property. Mere vague allegation or reproduction of the very words of the statutory provision is not sufficient to show the aforementioned present intention of the respondent, but, the materials on record, including the affidavit of the

petitioner, should reveal the particulars of such intention. Attachment before judgment is an extra ordinary power and the court may grant the same with care and caution. Attachment before judgment is not to be granted on a mere assertion by the petitioner that the respondent is attempting to dispose of the whole or part of his property or to remove whole or any part of his property from the jurisdiction of the court [See **Rai Premchand V. Ahammed (1982 KLT 294)**]; **Ratnamma V. Govinda Pillai (1995 (1) KT 405)** ; **Woodys Hotel Pvt Ltd. V. Prasant Kumar Panigrahy (1988 (1) KLT 149)** and **Skoda Auto India Private Ltd. V. St. Antony's Trading Company (2018 (1) KLT 558 (DB))**].

11. Except a bald statement that the petitioner, on his discreet enquiry and from real estate broker Charles Franklin, came to know that the respondent, with an intention to obstruct and delay the execution of the decree, is trying to alienate his petition schedule property for a lesser price, the affidavit is silent as to the nature, particulars and result of enquiry such as the name of purchaser, the amount of sale consideration and the date of sale. Admittedly, Ext.A1 reveals the value of petition schedule property as ₹81,83,700/-

(Rupees eighty one lakhs eighty three thousand and seven hundred only). Since it is a term of contract reduced in to writing, petitioner is precluded from stating a different consideration (**see Section 91 and 92 of the Indian Evidence Act, 1872**). More over no ordinary prudent man will purchase property for a higher consideration than its actual price. Thus, the petitioner's contention that the petition schedule property is worth less than the amount mentioned in Ext.A1 cannot be digested without a pinch of salt. Admittedly, respondent has debts even before the date of Ext.A1. But, despite the expiry of agreement period on 27.11.2019, respondent did not sell his property. So, the petitioner's allegation as to the alleged attempt is highly improbable.

12. Attachment before judgment shall not be a tool to convert an unsecured debt into a secured debt and to compel the opposite party for a settlement (see **Rajendran and Others V. Shankar Sundaram and Others ((2008) 2 SCC 724)**). Petitioner's conduct in seeking attachment of petition schedule property worth ₹81,83,700/- (Rupees eighty one lakhs eighty three thousand and seven hundred only) against his claim for ₹36,50,000/- (Rupees thirty six lakh fifty thousand only), out of it ₹2,25,000/- (rupees two lakh twenty five

thousand only) already received, shows that he is trying to convert an unsecured debt into a secured debt and to compel the respondent for a settlement. Thus, point No.2 is found against the petitioner.

13. Point Nos.3 & 4: - In view of the findings on point Nos.1 and 2, I hold that the petitioner is not entitled to an order of attachment before judgment of the petition schedule properties and hence, the petition is liable to be dismissed with costs of respondent. These points are also found against the petitioner.

In the result, the petition is dismissed with costs of respondent to be paid by the petitioner.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in the open court on this the 18th day of March, 2022).

Sd/-

**MANJITH.T.
Additional Sub Judge – I**

APPENDIX:

Petitioners' Exhibits:

A1	27.05.2019	Photocopy of the Agreement for Sale Deed
A2	25.10.2008	Photocopy of the Settlement Deed No.3298/2008 of SRO, Njarakkal

A3	24.12.2019	Photocopy of Release Deed No.2276/2019 of SRO, Njarakkal
A4	02.03.2020	Photocopy of the Possession Notice issued by Village Office, Njarakkal
A5	28.07.2020	Sanction Letter approving loan of ₹32,91,684/- issued by Axis Bank
A6	07.01.2021	Balance Certificate issued by Catholic Syrian Bank, Brigade Road, Bangalore

Respondent's Exhibits: Nil

Petitioners' Witness: Nil

Respondent's Witness: Nil

Court Exhibits: Nil

Id/-

Additional Sub Judge – I

Typed by : Sindhu.S.T.

O R D E R
in
IA No.02/2021
in
OS No.02/2021
Dated:18.03.2022