

MHKO050014112018



Order below Exh.15 in Special Civil Suit No.27/2018

[CNR:MHKO050014112018]

Shri. Sunil Shivaram Kolap

Vs.

1) Shri. Sachin Shivaji Kadam, etc.

The present application is filed under Order XXXVIII Rule 5 of Code of Civil Procedure for attachment of property of defendants before Judgment.

2. Defendants have filed say to the present application vide Exh.16.

3. It is the contention of plaintiff that, defendant Nos.1 and 2 are owner of suit property and they had agreed to sell the suit property to the plaintiff for total consideration of Rs.40,00,000/-. Further, it is the contention of plaintiff that, accordingly on 10/11/2014 agreement to sell of suit property was executed by defendant Nos.1 and 2 in favour of plaintiff by accepting earnest amount of Rs.6,00,000/-. Further, it is the contention of plaintiff that, it was mutually decided to execute the sale deed within 4 months after payment of remaining consideration amount. It is further contention of plaintiff that, on 28/12/2014 he has paid amount of Rs.1,00,000/- to the defendants. Further, it is the case of plaintiff that, due to technical difficulty after the expiry of time limit of the first

agreement to sell, another agreement to sell dated 12/05/2015 was executed and at that time plaintiff has paid amount of Rs.8,00,000/- to the defendants. Hence, it is the contention of plaintiff that, towards the transaction of purchase of suit property he has paid total amount of Rs.15,00,000/-. It is the contention of plaintiff that, defendants had assured him to make the suit property free from all the encumbrances.

4. Further, according to plaintiff, he has paid amount of Rs.1,50,000/-, Rs.1,50,000/-, Rs.1,25,000/-, Rs.1,75,000/-. Hence, according to plaintiff, in all total amount of Rs.21,00,000/- is paid to the defendants towards the agreement to sell of the suit property.

5. It is the contention of plaintiff that, however, due to the tension relating suit transaction, he failed ill and ultimately he was operated upon for brain tumour on 07/07/2017. Hence, according to plaintiff, he had to make substantial expenses towards his medical treatment. Further, according to plaintiff, defendant was not ready and willing to execute the sale deed.

6. Hence, it is the contention of plaintiff that, on 05/04/2018 he sent notice to defendant Nos.1 and 2 by R.P.A.D. and asked defendants to execute the sale deed. Further, it is the contention of plaintiff that, defendants agreed to execute the sale deed and have further agreed receipt of amount of Rs.21,00,000/-.

7. However, according to plaintiff, due to medical condition his health has deteriorated and now it has become difficult for him to pay remaining amount of balance consideration.

8. Hence, it is the contention of plaintiff that, he requested defendants to return the amount of Rs.21,00,000/- paid by him towards sale transaction of suit property. However, according to plaintiff, defendants denied to pay the amount, and therefore, he was constrained to file the present suit.

9. It is the contention of plaintiff that, defendant Nos.1 and 2 by taking disadvantage of the situation are about to leave jurisdiction of this Court by selling suit property. Further, according to plaintiff, defendants are searching buyers for the suit property with the help of agent. Hence, according to plaintiff, if the suit property is sold out by the defendants without his consent, then, if the decree is passed, there will be obstruction or delay in execution. Hence, it is prayed that during the pendency of the suit, the suit property be attached as per the provisions of Order XXXVIII Rule 5 of Code of Civil Procedure.

10. Defendants vide their say denied the contents of the application. They have admitted that agreement to sell of suit property was executed. However, it is their contention that, they were always ready and willing to perform their part of contract

and in their notice reply also they have communicated said fact to the plaintiff. However, according to defendants, instead of filing suit for specific performance, the plaintiff has filed the present suit and therein is seeking refund of amount of Rs.21,00,000/-. Defendants have denied acceptance of amount of Rs.21,00,000/-. Further, it is the contention of defendants, they are residing in the suit property and they have no alternative accommodation. Further, according to them, they never intended to leave the jurisdiction of this Court by selling of the suit property to third person. Hence, it is prayed that application be rejected with costs of Rs.10,000/-.

11. Perused application and say. Heard Learned Advocate of both sides.

12. Learned Advocate for plaintiff has relied upon the Judgment of Hon'ble Andhra Pradesh High Court in *Y. Kesavulu Vs. T. Kalavathi, Civil Revision Petition No.4915 of 2015 dated 1st June, 2006*, on the point that, application under Order XXXVIII Rule 5 cannot be waived for an undertaking given by the defendant.

13. Learned Advocate for defendants has relied upon the Judgment of Hon'ble Delhi High Court in *M/s. K.C.V. Airways Ltd. And another Vs. Wg. Cor. R.K. Blaggana, reported in AIR 1998 Delhi 70*, wherein it is held that, order under Order XXXVIII Rule 5 passed without satisfaction as to existence of conditions

laid down in Order XXXVIII Rule 5(1) is not valid.

14. Further, Learned Advocate for defendants has relied upon the Judgment of Hon'ble Madras High Court in ***UCO Bank Vs. Sukra Shoe Fabric and others, reported in AIR 1992 Madras 293***, wherein it is held that, the applicant must state grounds in application for attachment before Judgment and claim by applicant on the basis of mere conjectures and imaginations is not tenable.

15. Further, Learned Advocate for defendants has relied upon the Judgment of Hon'ble Madras High Court in ***L.V. Bhujanga Rao Vs. Ch. Venkateswara Rao and others, reported in AIR 1993 Madras 246***, wherein it is held that, on inadequate materials and in absence of valid grounds in the application, relief of attachment before Judgment cannot be granted.

16. I have gone through the ratio laid down by Hon'ble High Courts in the above referred Judgments. Keeping in mind the above ratio and principle I am dealing with the present application.

17. At the outset, it is necessary here to state that, the present suit is not simple money recovery suit. The present suit is filed, in fact, is for refund of earnest amount. Interestingly it is case of plaintiff that, defendants had agreed to sell suit property to him and, accordingly agreement to sell was executed. Further,

it is the case of plaintiff himself that, it was not possible for him to gather remaining amount of balance consideration, and therefore, sale deed cannot be executed. Further, at this stage, it is also important here to note that, notice sent by plaintiff to the defendants for execution of sale deed was replied by defendants and defendants were ready and willing to perform their part of contract. Hence, apparently at this initial stage it is clear that due to difficulty of the plaintiff he was not in a position to pay the amount of balance consideration, and therefore, sale deed is not executed.

18. In view of such circumstances, if the present application is allowed, its effect would be that plaintiff is not ready to pay the remaining amount of balance consideration and is further not ready to purchase the suit property and on the other hand by way of the present application he wants the property of defendants to be attached. Hence, if the present application is allowed, then it will cause prejudice to the defendants.

19. As regards to the reason for attaching the suit property before the Judgment in para 10 of the present application it is only stated that, there is possibility that defendants are about to leave the jurisdiction of this Court by selling of the suit property. In support of this contention, no other material is brought on record by the plaintiff. On the other hand, defendants in their reply have specifically stated that, they are

residing in the suit property and further they are carrying on power-loom business in the said suit property, and therefore, there is no possibility that they will leave the jurisdiction of this Court by selling of the suit property. As regards to the objection raised by defendants that plaintiff is not entitled to claim the refund of earnest amount that cannot be decided at this stage as this application is related to the issue whether plaintiff is entitled to relief under Order XXXVIII Rule 5 of Code of Civil Procedure.

20. In view of above discussion, plaintiff has not made out case for attaching the suit property before the Judgment. Therefore, the present application is liable to be rejected. The defendants have sought costs of Rs.10,000/- from the plaintiff for filing the present application which they claimed to be frivolous. However, considering the over all circumstances and the fact that suit is at initial stage and it is the contention of plaintiff that due to his illness and operation of brain tumour it was not possible for him to perform his part of contract, I do not found it just and proper to impose costs upon plaintiff. Therefore, I proceed to pass following order -

Order

- 1) Application (Exh.15) is rejected.

Date : 23-10-2019.

(Amit P. Kokare)
Civil Judge, Sr.Dn., Ichalkaranji

“I affirm that the contents of this P.D.F. file Judgment/Order are same word to word, as per the original Judgment/Order”.

Name of Stenographer	R.R. Patil
Name of Court	Shri. Amit P. Kokare, Civil Judge, Sr.Dn., Ichalkaranji
Date of Dictation	23-10-2019
Order signed by the P.O.on	24-10-2019 (Digitally signed on 01-11-2019)
Order uploaded on	01-11-2019