

MHKO050014112018



ORDER BELOW EXH.44 IN
SPECIAL CIVIL SUIT NO.27/2018
(Passed on 13. 06. 2024)

This is an application under Order 38 Rule 5 of the Code of Civil Procedure, 1908 for attachment before judgment of the property bearing Plot no.2 out of Gat no.544, ad-measuring area 1938.6 sq.ft. and building constructed thereon (for the sake of brevity, hereinafter referred to as 'suit property').

02. Learned counsel for the plaintiff submitted that defendant nos.1 and 2 have agreed to sell the above-said suit property. Thereafter plaintiff repudiated the said agreement and asked for refund of earnest amount of Rs.21,00,000/- paid by him to the defendant nos.1 and 2 towards the above-said agreement for sale. However, defendant nos.1 and 2 have refused to pay the said amount. Therefore, plaintiff instituted the present suit. Thereafter, defendant nos.1 and 2 have sold out the suit property to the defendant no.3. Plaintiff came to know that defendant no.3 is also trying to alienate the suit property to frustrate the claim of the plaintiff. Therefore, if the said property is again sold out to another person, plaintiff would be unable to recover the amount of decree which may be passed in his favour. Hence, he prayed to attach the suit property.

03. Defendant nos.1 and 2 have resisted the application vide their reply at Exh.47. It is submitted that alleged agreement for sale was breached by the plaintiff as he was not ready to perform his part of contract. Moreover, plaintiff has not claimed any relief in respect of suit property. Therefore, he cannot claim the attachment of the suit property which is already sold out to the defendant no.3. Hence, it is prayed to reject the application.

04. Defendant no.3 has resisted the application vide his reply at Exh.57. It is submitted that sale deed of the suit property is legal and plaintiff has no right or interest in the suit property. Moreover, plaintiff has claimed the refund of earnest amount from the defendant nos.1 and 2. Therefore, plaintiff has no rights to seek any relief in respect of the suit property. Hence, it is prayed to reject the application.

05. It is undisputed that plaintiff is not claiming any relief in respect of suit property. Moreover, it is undisputed that suit property is already sold out to the defendant no.3. Furthermore, defendant no.3 was not party to the contract between plaintiff and defendant nos.1 and 2. As such, even if decree of refund of earnest amount is passed in favour of plaintiff, it cannot be enforceable against the defendant no.3 under the facts and circumstances of the present suit. In these facts and circumstances of the case, defendant no.3 cannot be made to suffer for the contractual obligation arising out of the contract between plaintiff and defendant nos.1 and 2. Consequently, suit property which is now

owned by defendant no.3 cannot be attached as per Order 38 Rule 5 of the Code of Civil Procedure, 1908.

06. It is significant to note that previous application filed by the plaintiff at Exh.15 under Order 38 Rule 5 of the Code of Civil Procedure, 1908 was rejected by my learned predecessor. It is well settled that principle of *res judicata* applies to subsequent stage of the same proceeding. As such, once the issue of attachment of suit property as per Order 38 Rule 5 is already decided by my learned predecessor after giving opportunity of hearing to both the parties, it cannot be agitated again by means of present application. On this ground also present application is not maintainable in the eye of law.

07. In view of the aforesaid facts and circumstances of the case, application is liable to be rejected. Hence, I pass the following order :

ORDER

- 1) Application at Exhibit No.44 is hereby rejected.
- 2) Cost in cause.

Ichalkaranji
Date :- 13. 06. 2024

(Hitendra Urmila Anilkumar Wani)
Civil Judge, Sr.Dn., Ichalkaranji